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HANDBOOK
OF THE LAW OF
PRIVATE CORPORATIONS

By WM. L. CLARK, JR.

**INSTRUCTOR IN LAW IN THE CATHOLIC UNIVERSITY OF AMERICA,
AND AUTHOR OF HORNBOOKS ON "CRIMINAL LAW," "CRIMINAL PROCEDURE,"
AND "CONTRACTS"**

SECOND EDITION
By FRANCIS B. TIFFANY

ST. PAUL, MINN.
WEST PUBLISHING CO.

1907

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CLARK CORP.(2D ED.)

To
FRANK P. CLARK, Esq.,
of Baltimore,

As a slight mark of the author's regard and of his remembrance
and sincere appreciation of many kindnesses,

THIS VOLUME IS AFFECTIONATELY DEDICATED.

(v)•

PREFACE TO SECOND EDITION.

IN the ten years which have elapsed since the first edition many important decisions upon corporation law have been rendered. Many recent cases have been added to the notes, and some changes in the text have been made in consequence, and some new matter has been incorporated.

F. B. T.

St. Paul, March 9, 1907.

PREFACE TO FIRST EDITION.

THERE are few subjects in the law in which so many difficulties, and so great a conflict in the decisions, are to be met with as in the law of private corporations. The law is unsettled on many points. These points have received special attention in this treatise, and to some of them more space has been devoted than is given them in the larger works. For examples, reference may be made to the chapters in which are discussed the doctrines in regard to corporations de facto (page 86),¹ estoppel to deny corporate existence (page 99),² subscriptions to stock prior to incorporation (page 263),³ and watered stock (page 368).⁴ The doctrine, often laid down in the cases, and stated in all the text books, but which has been virtually exploded by recent decisions, that the capital stock and assets of a corporation constitute a trust fund for the benefit of creditors, has been given considerable space (page 539).⁵

The entire work has been written from the cases themselves, and throughout his work the author has aimed at making the book a true reflection of the cases. The authorities have been selected with care, and none have been cited without personal examination.

The work is not intended to deal with corporation law in its application to particular corporations, but only with the rules and principles of law applicable to corporations generally. It would be impossible to go further than this, and keep within the limits of a handbook in one volume.

WM. L. C., JR.

Washington, D. C., February 6, 1897.

¹ Page 78, 2d Ed.

² Page 91, 2d Ed.

³ Page 260, 2d Ed.

⁴ Page 355, 2d Ed.

⁵ Page 528, 2d Ed.

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HANDBOOK

OF THE

LAW OF PRIVATE CORPORATIONS.

SECOND EDITION.

CHAPTER I.

OF THE NATURE OF A CORPORATION.

- 1-3. Corporation Defined.
- 4. Creation of Corporations.
- 5. Limited Powers of Corporations.
- 6-8. Attributes and Incidents of a Corporation.
- 9. Corporation as a "Person," "Citizen," etc.
- 10-11. Kinds of Corporations.

CORPORATION DEFINED.

- 1. A corporation aggregate is a collection of individuals united, by authority of law, into one body, under a special denomination, with the capacity of continuous succession, and of acting in many respects as an individual.¹ Every corporation aggregate consists of:**
- (a) A collection of individuals.**
 - (b) A legal entity, which is, for many purposes, in contemplation of law, separate and distinct from the members who compose it.**

¹ "Bodies politic and corporate have been known to exist as far back, at least, as the time of Cicero; and Gaius traces them even to the laws of Solon, of Athens, who lived some 500 years before. Poth. *Panel of Just.* (Paris Ed., 1823) bk. 3, p. 109. These associated bodies, or communities of individuals, with certain rights and privileges belonging to them by law in their aggregative capacity, were styled by the Romans 'Collegium,' and sometimes 'Universitas'; as, 'Collegia Zibicimum,' 'Collegia Aurificum,' 'Collegia Architectorum,'— the society, corporation, or community of flute players, goldsmiths, architects, etc. Id. bk. 20, p. 110. The terms used by one of the

2. For the purpose of acquiring, holding, and conveying property, contracting obligations, incurring liabilities, suing and being sued, a corporation is regarded in law as a legal entity, separate and distinct from the members who compose it. For instance:
- (a) The property of a corporation is owned by the corporation, and not by the individual members.
 - (b) Conveyances of such property must be made by the corporation, and cannot be made by the members as individuals.
 - (c) Suits on causes of action accruing in favor of or against a corporation must be brought by or against the corporation, and not by or against the members individually.
 - (d) A corporation may take from and convey to its members, and may contract with them, and may sue them and be sued by them.
3. That a corporation is thus a legal entity, separate and distinct from the members who compose it, is a mere legal fiction, introduced for the convenience of the corporation in transacting business, and of those who do business with it; and, when urged to an intent and purpose not within its reason and policy, the fiction will be disregarded, and the fact that the corporation is really a collection of individuals will be recognized in equity, and even at law.

Definitions.

"Persons capable of purchasing," said Lord Coke, "are of two sorts, persons natural, created of God, and persons created by the policy of man, as persons incorporated into a body politic."² The latter sort of

Roman jurisconsults to describe the nature of such a corporation or associated body of individuals, under the laws of the republic, are, perhaps, as appropriate as any general language which can be used to describe a corporation aggregate at the present day, without referring to the specific object for which any particular corporation is organized. I have thus translated it from the Latin of the Digest: 'But those who are permitted to form themselves into a body, under the name of a corporation, society, or other community, have within their peculiar jurisdiction, as in the similar case of the republic, property in common, and a common chest or treasury, and an agent or head of the corporation or society, by whom, as in the republic, whatever is necessary to be done for the benefit of the community may be transacted.' Dig. lib. 8, tit. 4a. And from time immemorial, as at the present day, this privilege of being a corporation, or artificial body of individuals, with the power of holding their property, rights, and immunities in common, as a legally organized body, and of transmitting the same in such body by an artificial succession different from the natural successions of the property of individuals, has been considered a franchise, which could not be lawfully assumed by any associated body without a special authority for that purpose from the government or sovereign power. Dig. lib. 47, tit. 22, De Coll. et Corp., 4 Guyol, Rep. de Jur. art. 'Communante Laique'; Domat, Pub. Law, bk. 1, tit 15, § 2." Warner v. Beers, 23 Wend. (N. Y.) 103, 122. For the history of corporations, see 2 Kent, Comm. 268; 1 Wat. Corp. § 11; 1 Pol. & M. Hist. Com. Law, 469.

² 1 Co. Inst. 202, 250.

person is what we call a corporation, or body corporate. "It is called a body corporate because the persons composing it are made into one body." "It is only in abstracto, and rests only in contemplation of law."³

Many definitions of a corporation may be found in the books, differing more or less from each other; but there are two, which are often quoted, and which bring out better than any others the two sides of a corporation. One is the definition of Chief Justice Marshall in the Dartmouth College Case; and the other is that of Mr. Kyd, who wrote on the law of corporations in England about a century ago.

Chief Justice Marshall said: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."⁴

Mr. Kyd defines a corporation as: "A collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations,

³ 10 Rep. 50. "A body politic is a body to take in succession, framed (as to that capacity) by policy, and therefore it is called by Littleton a 'body politic'; and it is called a 'corporation' or 'body corporate' because the persons are made into a body, and of a capacity to take and grant," etc. Co. Litt. 250a.

⁴ Per Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 636, 4 L. Ed. 629, 1 Cumming, Cas. Priv. Corp. 490, W. D. Smith, Cas. Corp. 148, Shep. Corp. Cas. 248. "A corporation is a body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person." Ang. & A. Corp. § 1. For other definitions, see 10 Cyc. 143.

and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence." ¹

Chancellor Kent's description of a corporation is as follows: "A corporation is a franchise possessed by one or more individuals, who subsist, as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual. The object of the institution is to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation and their successors are considered in law as but one person, capable under an artificial form of taking and conveying property, contracting debts and duties, and of enjoying a variety of civil and political rights. One of the peculiar properties of a corporation is the power of perpetual succession; for, in judgment of law, it is capable of indefinite duration. The rights and privileges of the corporation do not determine or vary on the death or change of the individual members. They continue as long as the corporation endures. * * * It was chiefly for the purpose of clothing bodies of men in succession with the qualities and capacities of one single, artificial, and fictitious being, that corporations were originally invented, and for the same convenient purpose they have been brought largely into use. By means of the corporation many individuals are capable of acting in perpetual succession like one single individual, without incurring any personal hazard or responsibility, or exposing any other property than what belongs to the corporation in its legal capacity."²

In *People v. Assessors of Village of Watertown*,³ it was said by Bronson, J.: "A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person. It does not occur to my mind that anything else can be essential to the definition. Such a union as I have mentioned can only be effected under a grant of privileges from the sovereign power of

¹ 1 Kyd, Corp. 13. And see *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.

² 2 Kent, Comm. 267, 268.

³ 1 Hill (N. Y.) 620.

the state. A corporation is, therefore, said to be a legal being, or the mere creature of law."

The Corporation as a Legal Entity.

These definitions show that a corporation is for many purposes, in the contemplation of law, an artificial person or entity, having an individuality separate and distinct from that of the members who compose it. The existence of the members is, in law, and, for most purposes, in equity also, merged in that of the corporate body, and lost sight of. As a legal entity it takes and holds property, and conveys the same; it contracts obligations, and it sues and is sued, in its corporate name, in the same manner as a natural person. For these purposes the members of the corporation are not regarded. They compose the corporation, but they are not the corporation.⁸

In an English case, which serves as a good illustration of this characteristic of a corporation, suit was brought to compel customhouse officers to register a vessel belonging to a British corporation, and was resisted on the ground that, as some of the members of the corporation were foreigners, the vessel did not belong wholly to British subjects, as was required by statute to entitle it to registry. The court held, however, that the vessel belonged to the corporation, and not to the individual members, and was therefore entitled to registry, and that this would be so even if all the stock in the corporation had been owned by foreigners.⁹

This characteristic of a corporation, as a legal entity, separate and distinct from its members, is of peculiar importance with respect to the ownership and conveyance of corporate property, the effect of corporate contracts, and the right to maintain actions concerning corporate property and rights, and for corporate wrongs. For these purposes the law generally considers the corporate body only.¹⁰ The members of a corporation do not take, nor can they grant, its property; but the corporation does so itself in its corporate name. The corporate property does not in any legal sense vest in or belong to the individual members, though they are interested in it to the extent that they may derive benefit from its increase, or suffer loss from its destruction.* They are in no legal sense, however, the own-

⁸ See the *Queen v. Arnaud*, 16 Law J. O. L. 50, 1 Cumming, Cas. Priv. Corp. 30; *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 792; *Bronson, J.*, in *People v. Assessors of Village of Watertown*, 1 Hill (N. Y.) 620; and the cases cited in the following notes.

⁹ *The Queen v. Arnaud*, *supra*.

¹⁰ *Post*, p. 375.

* Present ownership not being necessary to give an insurable interest in property, it has been held that a stockholder has such a beneficial interest

ers of its property. As we have seen, for instance, property belonging to a British corporation belongs wholly to a British subject (the corporation), though some or even all of its members may be foreigners.¹¹ So, a member of a corporation has not such a distinct right in its property as to make his interest attachable for his debts.¹² And the corporation, and not the individual members, must bring trover for conversion of its property,¹³ or replevin to recover possession of the same.¹⁴ And the members of a corporation have no power to sell or convey its property, but all such transactions must be by and in the name of the corporation.¹⁵ The members of a corporation cannot bind it by contracts entered into individually. A corporation, as we shall see,* may become bound by a contract entered into on its behalf by its promoters, by adopting it, or accepting the benefit of it; but here the corporation, by adoption, makes a contract itself. Contracts made by the members of a corporation as individuals, either before or after incorporation, do not bind the corporation.¹⁶ Nor can the declarations or admissions of individual members of a corporation, when they are not authorized to act as its agent in the matter, be received as evi-

in the corporate property as to give him an insurable interest. *Warren v. Insurance Co.*, 31 Iowa, 464, 7 Am. Rep. 160.

¹¹ *The Queen v. Arnaud*, supra.

¹² *Williamson v. Smoot*, 7 Mart. O. S. (La.) 34, 12 Am. Dec. 494, 1 Cumming, Cas. Priv. Corp. 32.

¹³ *Tomlinson v. Bricklayers' Union*, 87 Ind. 308, 1 Cumming, Cas. Priv. Corp. 33.

¹⁴ *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131, 1 Cumming, Cas. Priv. Corp. 38.

¹⁵ *Wheelock v. Moulton*, 15 Vt. 519; 1 Cumming, Cas. Priv. Corp. 35; *Baldwin v. Oanfield*, 26 Minn. 43, 1 N. W. 261; *Parker v. Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589.

* Post, p. 104.

¹⁶ *Davis v. Creamery Co.*, 48 Neb. 471, 67 N. W. 436. In *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23, a valid contract was entered into by competing firms, by which one of them agreed not to sell goods in a certain territory in opposition to the other. After this the members of this firm and others formed a corporation for carrying on the same general business, and after a time announced their intention to handle the same goods formerly sold by the firm, and in the district in which the firm had bound themselves not to sell. It was held that, in the absence of allegations that the corporation was fraudulently created with the intent on the part of the stockholders to evade and avoid their obligations as individuals, and that the partners in the original firm had reserved to themselves interests in the business distinct from their interests as stockholders, the corporation could not be enjoined from carrying on the business.

dence against the corporation, any more than the declarations and admissions of a stranger could be admitted.†

These rules are the same even when all the stock in the corporation is owned by one person, for this circumstance does not change his relation as a mere stockholder. The corporation is still a separate and distinct artificial person, in the eye of the law.¹⁷

On the same principle, the shares in a corporation organized for the sole purpose of holding and managing real estate, are personal property, and not real estate. The real estate is owned by the corporation, the artificial being, and not in any sense by the individual members, like partnership real estate, which is owned by the partners as tenants in common.¹⁸

It also follows from the distinction between the individuality of the corporation and that of its members that a corporation may convey its property to one or more of its members, or its members may convey to it, and it may enter into contracts with its members, without the conveyance being open to the objection that the same person is both grantor and grantee, or the contract being objectionable on the ground that it is a contract by a man with himself.¹⁹

It also follows from this characteristic of corporate bodies that a corporation may sue its members, and be sued by them.²⁰ So, actions by and against corporations are not in any sense actions by and against the stockholders. Thus, a sheriff, who owns stock in a corporation, is not a party to a suit by or against the corporation, within

† *Polleys v. Insurance Co.*, 14 Me. 141; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173.

¹⁷ "The owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists, he is a mere stockholder of it, and nothing else." *Button v. Hoffman*, supra. And see *Wheelock v. Moulton*, supra; *Baldwin v. Canfield*, supra; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387; *City of Louisville v. McAteer*, 81 S. W. 698, 26 Ky. Law Rep. 425, 1 L. R. A. (N. S.) 766. In *Parker v. Hotel Co.*, supra, it was held that a stockholder of a corporation does not, by becoming owner of the entire stock, acquire an equitable estate in real property of the corporation which would enable him to make a conveyance thereof in his own name. But see *Bundy v. Iron Co.*, 38 Ohio St. 300. Post, p. 238.

¹⁸ *Russell v. Temple* (Mass.) 3 Dane, Abr. 108.

¹⁹ *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *Foster v. Commissioners of Inland Revenue* (1894) 1 Q. B. 516; *Lexington Life, F. & M. Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Gordon v. Preston*, 1 Watts (Pa.) 385, 26 Am. Dec. 75; post, p. 251 et seq. 490.

²⁰ *Waring v. Catawba Co.*, 2 Bay (S. C.) 109; *Pope v. Brandon*, supra; *Culbertson v. Navigation Co.*, Fed. Cas. No. 3,464; *Geer v. School Dist.*, 6 Vt. 76; *Sawyer v. Society*, 18 Vt. 405; *Rogers v. Society*, 19 Vt. 187.

the meaning of a statute disqualifying an officer from serving process where he is a party to the suit.²¹ For the same reason, a justice or judge who is related to a member of a corporation, or who is himself a member, is not disqualified to try an action by or against the corporation, under a statute disqualifying because of relationship to either of the "parties."²² And in a late Minnesota case it was held that the demands of stockholders individually cannot be interposed as equitable set-offs to a demand against the corporation, even though the plaintiff be insolvent.²³ The federal courts are given jurisdiction in certain cases of suits between citizens of different states. Within the meaning of the law, a corporation is a citizen of the state of its creation, and may sue a citizen of another state, though all of its members may be citizens of the latter state. The action is by the corporation, not by its members.²⁴

The Corporation as a Collection of Individuals.

When it is thus said that a corporation is a legal entity, separate and distinct from the persons who compose it,—that the individual existence of the members is merged in the artificial individuality of the corporate body,—it must not be understood that the law cannot under any circumstances look behind this artificial entity, and notice the existence and acts of its members. One cannot shut his eyes to the fact that private corporations are all formed by an association of individuals, under authority of law, and that to this extent they are mere collections of individuals. The legal conception of a corporation as an entity distinct from its members is a mere fiction adopted by the law, for the purpose of enabling natural persons to transact business in this peculiar way; and, whenever it is necessary to do so, the law will look behind the corporate body, and recognize the members, and disregard the fiction.

In a late New York case,²⁵ the state asked a forfeiture of the charter of a corporation because of its illegal conduct in entering into an unlawful association with other corporations and firms engaged in the same business. There had been no formal action by the defendant's trustees or directors, but the stockholders individually had transferred their stock to the parties representing the combina-

²¹ Merchants' Bank v. Cook, 4 Pick. (Mass.) 405.

²² Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; Stuart v. Bank, 19 Johns. (N. Y.) 501. Contra, Washington Ins. Co. v. Price, 1 Hopk. Ch. (N. Y.) 1.

²³ Gallagher v. Brewing Co., 53 Minn. 214, 54 N. W. 1115.

²⁴ Post, p. 66.

²⁵ People v. North River Sugar-Refining Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843. See, also, People v. Kingston & M. Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

tion. It was contended that the combination was due to the acts of the stockholders, and not to any corporate action, and that, therefore, the corporation was not guilty of any misconduct. The court declined to take this view, and held that the misconduct of the stockholders, and of the officers in recognizing the transfers of stock, was the misconduct of the corporation.²⁶ A like question arose in a late Ohio case, and a like decision was made.²⁷

²⁶ It was said in this case: "There may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution. * * * The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action or agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material; but, as between it and the state, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, and redound to their benefit, to strengthen their hands, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act collectively, as an aggregate body, without the least exception, and, so acting reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction."

²⁷ *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. In this case it was said: "The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim, 'In

Courts of equity, in numerous instances, look behind the corporation, and recognize the rights of the corporation as being in reality rights of the individuals composing it. The rights of the members of a corporation, in their collective capacity, in its property, must generally be enforced, even in equity, through the corporation as a distinct legal person; but if, for any reason, this cannot be done, courts of equity will not allow the legal fiction of a distinct corporate entity to stand in the way of justice. Thus, though an action against the officers of a corporation for conversion of its property, or a suit in equity to enjoin them, must be brought in the name of the corporation if it can be done, yet, if the offending officers are a majority of the directors, and own a majority of the stock, so that an injured stockholder cannot obtain relief at law through the corporation, he may maintain a suit in equity in his own name.²⁸ On the other hand, if all the stockholders of a corporation are individually in such a position as to be without equity in regard to a particular matter, they cannot obtain equitable relief through the corporation, and in its name.²⁹

CREATION OF CORPORATIONS.

4. **A corporation can be created only by or under authority from the state. It cannot be formed by mere agreement between the members.**

In this respect a corporation is very different from an ordinary partnership. A partnership is formed by a mere agreement between the parties who become members, and no legislative authority is necessary. A corporation cannot be so formed. It can be created only by or under authority from the state conferred by the legislature. The creation of corporations will be considered at length in a subsequent chapter.³⁰

fictione juris substitit æquitas, is used, and the doctrine of fictions applied. But, when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts. * * * Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but, where it is urged to an end subversive of its policy, * * * the fiction must be ignored." See, also, *First Nat. Bank of Chicago v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 884.

²⁸ Post, p. 375.

²⁹ *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954.

³⁰ Post, p. 29.

LIMITED POWERS OF CORPORATIONS.

- 5. A corporation, being the mere creature of the legislature, has such powers only as are expressly or impliedly conferred upon it by the charter or act of incorporation.**

A common partnership has the same powers as the members would have individually. As its formation does not depend at all upon legislative authority, neither do its powers. A corporation, on the other hand, being the creature of the legislature, has such powers, and such powers only, as are expressly or impliedly conferred upon it by the charter or act of incorporation. It cannot do acts which would be lawful for individuals, or even praiseworthy, unless the power to do them can be derived from its charter.⁸¹

ATTRIBUTES AND INCIDENTS OF A CORPORATION.

- 6. The following powers and faculties, and these only, are essential to the existence of a corporation:**
- (a) To have continuous succession, under a special name, and in an artificial form, without being subject to dissolution or change of identity by the death, withdrawal, or legal disability of individual members.**
 - (b) To take and grant property and contract obligations, within the limits of the power conferred upon it by its charter, and to sue and be sued, in its corporate name, in the same manner as an individual.**
 - (c) To receive grants of privileges and immunities, and to enjoy them in common.**
- 7. The following powers and faculties are incident to most private corporations, but are not essential to corporate existence:**
- (a) Transferability of shares.**
 - (b) Exemption of the members from personal liability for the debts of the corporation beyond the amount of their respective proportions of the capital.**
 - (c) Power to purchase and hold real estate.**
 - (d) Power to use a common seal.**
 - (e) Power to make by-laws.**
- 8. The distinguishing characteristic of a corporation, "which makes it to be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial, individual existence."**

Under this head we shall ascertain the attributes and incidents of a corporation, and the characteristics which distinguish it from other associations of individuals. A corporation is known to the

⁸¹ Post, p. 112.

law by the powers and faculties bestowed upon it expressly or impliedly, by the charter or act creating it. The words "corporation" or "incorporate" need not be used in its creation.⁸² Nor, on the other hand, does the use of such words necessarily make the particular association a corporate body. The use of these or equivalent words may impliedly confer corporate powers and faculties, and therefore create a corporation, if there is nothing to show that powers and faculties essential to corporate existence were intended to be withheld; but if, in fact, essential powers and faculties are not conferred, then the body created or intended to be created is no corporation, whatever may have been the intention of the legislature. On the other hand, even the express declaration of the legislature, in the act by which it creates or authorizes an association, that it shall not constitute or be considered a corporation, will not prevent the courts from holding that it is a corporation, if the attributes conferred upon it make it so.⁸³ In order, therefore, to determine whether a particular association is a corporation or not, it is necessary to ascertain the properties essential to constitute such a body, and compare them with those conferred upon the association. If they exist in common or substantially correspond, the association is a corporation; otherwise, it is not.⁸⁴ As we shall see, many faculties are generally incident to a corporation, but are not essential to corporate existence. And, on the other hand, some faculties which are essential may exist also in an unincorporated association.

The powers and faculties generally specified as creating corporate existence are: (1) The capacity of perpetual succession; (2) the

⁸² *Thomas v. Dakin*, 22 Wend. (N. Y.) 9, 1 Cumming, Cas. Priv. Corp. 1; *Sutton's Hospital Case*, 10 Coke, 23a, 28a, 2 Cumming, Cas. Priv. Corp. 14, *Shep. Cas. Corp.* 3; *Conservators of the River Tone v. Ash*, 10 Barn. & C. 349, 1 Cumming, Cas. Priv. Corp. 23; *Blanchard v. Kaull*, 44 Cal. 440.

⁸³ *Bronson, J.*, in *People v. Assessors of Village of Watertown*, 1 Hill (N. Y.) 620; *Hand, Senator*, in *Gifford v. Livingston*, 2 Denio (N. Y.) 395; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 585, 30 C. O. A. 293; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 568, 19 L. Ed. 1029, 1 Cumming, Cas. Priv. Corp. 26, *W. D. Smith, Cas. Corp.* 13, *Shep. Cas. Corp.* 5. In the latter case an association created by the British parliament was expressly declared not to be a corporation, but it was given all the attributes necessary to make it one. It was held by the supreme court of the United States that, whatever might be the effect of such declaration in the British courts, it could not alter the essential nature of a corporation, or prevent the courts of another jurisdiction from inquiring into its true character, whenever it should come in issue; and it was held that the body was a corporation.

⁸⁴ *Thomas v. Dakin*, *supra*; *Sutton's Hospital Case*, *supra*; *Conservators of the River Tone v. Ash*, *supra*; *Liverpool Ins. Co. v. Massachusetts*, *supra*.

power to grant and receive, to contract, and to sue and be sued, in the corporate name; (3) the power to purchase and hold real and personal estate; (4) the power to have a common seal; and (5) the power to make by-laws. As was pointed out in a New York case,³⁵ however, these indicia were given by judges and elementary writers at a very early day. Since that time the institutions have greatly multiplied, and their practical operation and use have been thoroughly tested, and their peculiar and essential properties are much better understood, and at the present time some of the powers above specified are recognized as wholly unessential.

Perpetual Succession.

One of the chief attributes of a corporation, and one that is essential to corporate existence is the power or faculty of having perpetual succession,³⁶ under a special denomination, and in an artificial form, without being subject to dissolution or change of identity by reason of the death, legal disability, or withdrawal of members. In the case of an ordinary partnership, the withdrawal of a member dissolves the firm. Even if the remaining partners continue to carry on the business as a firm, and under the same firm name, the identity of the firm is changed. The remaining partners constitute a new and distinct firm. Even if the outgoing partner transfers his interest with the consent of the other members so as to introduce the transferee into the partnership, there is, in law, a new partnership agreement, and a new firm. However numerous such changes in membership may be, and though there may be no break in the continuity of the business, nor change in the firm name, at each change an existing firm is dissolved, and a new one is formed.³⁷ So, where a partner dies, this will ordinarily dissolve the firm, and his interest in the property will go to his heirs and personal representatives.

³⁵ Thomas v. Dakin, supra.

³⁶ It is generally said, as in the text, that a corporation has the faculty of "perpetual" succession, and a corporation has been described as an "immortal" being. It is not meant by this that a corporation must, but simply that it may, continue forever. Private corporations are almost always limited in their duration, by the act creating them, to a certain number of years; and, even when not so limited, they may forfeit their right to corporate existence, and be dissolved.

³⁷ George, Partnership, p. 102. It is permissible, it has been said, for parties to stipulate in a partnership agreement that the death of a member of the firm or an assignment by him of his interest shall not dissolve the partnership, but that the executors of the deceased partner or his assignee, as the case may be, shall succeed to membership. Warner v. Beers, 23 Wend. (N. Y.) 103, 146, 1 Cumming, Cas. Priv. Corp. 10, W. D. Smith, Cas. Corp. 3. Even in such a case as this, however, the identity of the firm is necessarily changed.

And there are some legal disabilities, which, if they attach to a partner, will operate as a dissolution of the firm.³⁸

This is not true of a corporation. Neither the existence of a corporation nor its identity is in any way affected or changed by the withdrawal of individual members. Unless prevented by the peculiar nature and object of the corporation,³⁹ any member may transfer his shares without the consent of his associates, and the transferee will come into the association as a member, without in any sense changing the identity or affecting the existence of the corporate body.⁴⁰ So, if a member dies, the existence or identity of the corporation is not affected; but whoever becomes the legal holder of the shares, which are transferred by operation of law like other personal property, succeeds to membership. This mark of corporate existence may exist in unincorporated associations by statute.⁴¹

The Faculty of Acting as a Legal Entity.

We have seen that a corporation can take and grant property and contract obligations within the limits authorized by its charter, and sue and be sued, in its corporate name, in the same manner as an individual.⁴² In other words, it has the faculty of dealing and being dealt with as a distinct person in the eye of the law, apart from its members. In this respect a corporation differs widely from an ordinary partnership. If a firm takes a conveyance of property, it vests in the partners individually as tenants in common, each having an undivided interest therein. And each member of the firm may by his individual act transfer his interest in the firm property. When a firm enters into a contract, it is a joint contract, binding the partners as individuals. When suit is brought by or against a firm, it must, in the absence of statutory provision to the contrary, be brought by or against the members individually. In a word, the common law does not recognize a firm as a legal entity apart from the members, but deals with the members themselves individually.

It is altogether different in the case of a corporation. A corporation, in the exercise of its power to take and grant property, to enter into contracts, etc., acts through its agents as an individual. Being impersonal, it can act only by means of duly-appointed agents. But the acts of the agents are in law the acts of the corporation, and not the acts of the individual members. So, when a cause of action accrues in favor of or against a corporation, the corporate body sues or is sued in its corporate name, and the suit is not brought by or against the members individually.⁴³

³⁸ George, Partnership, pp. 102, 257.

³⁹ Post, p. 15.

⁴⁰ Post, p. 15.

⁴¹ Post, p. 20.

⁴² Ante, p. 5.

⁴³ Ante, p. 5.

Special Denomination, or Corporate Name.

A name is essential to a corporation, for without a name it could not be known, it could not contract, it could not make or take a conveyance of property, it could not sue or be sued; in short, it could do no act as an artificial person distinct from its members. "A corporation is a body politic, consisting of material bodies, which, joined together, must have a name to do things which concern the corporation, or else it is no corporation."⁴⁴

The right to use a special name, to contract obligations under it, and the right and liability to sue and be sued by it, has been mentioned as a criterion of corporate existence; but it is not so. Unincorporated associations may be authorized by statute to use a special name, and to sue and be sued by it; and, by statute, in some states, a limited partnership may sue and be sued in the name of the general partner.

Transferability of Shares.

A member of the firm cannot, unless there is a provision therefor in the partnership articles, transfer his membership to another, without the consent of the other members. In the case of most private corporations, on the other hand, the shares are transferable without the consent of the other shareholders.⁴⁵ Transferability of shares has been mentioned as one of the distinguishing features of a corporation, but

⁴⁴ *Conservators of the River Tone v. Ash*, 10 Barn. & C. 849, 1 Cumming, Cas. Priv. Corp. 23. And see *Marlot v. Mascal*, And. 206; *post*, p. 63. The fact that an association having all the essential attributes of a corporation conducts part of its business in its corporate name, and part in the name of its president for the time being,—as where it contracts in its corporate name, and sues and is sued in the name of its president,—in no degree changes the character of the body, for a corporation may have more than one name. "A corporation may have more than one name. It may have one in which to contract, grant, etc., and another in which to sue and be sued. So, it may be known by two different names, and may sue and be used in either; and the name of the president, his official name, or any other, will answer every purpose. The only material circumstance is a name or names of some kind in which all the affairs of the company may be conducted." *Thomas v. Dakin*, 22 Wend. (N. Y.) 9, 1 Cumming, Cas. Priv. Corp. 1; *Edgeworth v. Wood*, 58 N. J. Law, 463, 33 Atl. 940; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 19 L. Ed. 1029, 1 Cumming, Cas. Priv. Corp. 26, W. D. Smith, Cas. Corp. 13, Shep. Cas. Corp. 5. In these cases the statute provided for suits by and against the associations in the name of their principal officer, and the associations were allowed to contract in their artificial name. It was held that they were corporations. "If it can contract in the artificial name," it was said in the case last cited, "and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name."

⁴⁵ *Post*, p. 393.

it is not necessarily so. It is an incident of most private corporations, but it is by no means essential to corporate existence. For instance, it does not enter into the constitution of chartered colleges, academies, hospitals, and other corporate institutions founded by public endowment or private beneficence; nor of incorporated scientific and literary societies, or corporate societies for mutual benefit or charity, in the funds of which the members have a beneficial interest, such as mutual benefit insurance companies, trade unions, etc. The absence of this feature, therefore, does not show that the particular association is not a corporation. Nor, on the other hand, does the fact that shares are transferable show that the association is a corporate body, for the right to transfer may, if the parties choose, be provided for in partnership articles.⁴⁶ There is this difference, however. In most private corporations the transferability of shares is incidental, and need not be expressly provided for. In the case of a partnership an express provision is necessary to render the shares transferable.

Exemption of Members from Personal Liability.

One of the most familiar distinctions, in popular understanding, between corporate bodies and common partnerships or other unincorporated associations, is the exemption of the members from personal liability for the debts of the association. In the case of a partnership, at common law, each member is personally liable for all the debts of the firm, after the joint assets have been exhausted. In the case of a corporation, at common law, the members of a business corporation are exempt from personal liability for the debts of the corporation beyond the amount of their respective proportions of the capital.

This has often been mentioned as peculiar to a private corporation, but it is not necessarily so. The exemption of members from personal liability is merely an incident to a corporation, in the absence of a statute altering the common-law rule. It is not an essential attribute. In many states statutes have been enacted, rendering the members of a private business corporation personally liable, to a greater or less extent, for its debts, where the corporate assets are insufficient to pay them in full. Such a statute does not in any sense change the character of the body as a corporation.⁴⁷ On the other hand, the liability of partners may be thus limited. The statutes relating to limited partnerships show that the partners

⁴⁶ Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cumming, Cas. Priv. Corp. 10, W. D. Smith, Cas. Corp. 3.

⁴⁷ Warner v. Beers, supra; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029, 1 Cumming, Cas. Priv. Corp. 26, W. D. Smith, Cas. Corp. 13, Shep. Cas. Corp. 5. See post, p. 550.

may be exempted from liability beyond their shares in the joint fund, without converting such firms into bodies corporate. Besides this, persons have a natural right, unless restrained by legislative enactment, to contract to make payment only to the amount of certain specific funds.⁴⁸

Power to Purchase and Hold Real Estate.

Among the other powers which are usually attributed to corporations, but which are by no means essential to corporate existence, may be mentioned the power to purchase and hold real estate. This power generally exists, but it is altogether unessential, unless the purpose for which the corporation was created requires it to hold real estate.*

Power to Use a Common Seal.

So it is with the power to use a common seal. At common law a corporation has, as an incident, the power to use a seal whenever it is necessary in the transaction of its business; but the power may be dispensed with altogether, for it is well settled that corporations may, unless expressly restricted by their charter, contract by resolution or through agents, and without a seal.⁴⁹

Right to Make By-Laws.

The same may be said of the right to make by-laws. This power is generally incidental to a corporation, but it is not essential to corporate existence. It is unnecessary in all cases where the charter sufficiently provides for the government of the body.⁵⁰

Conclusion as to Attributes Essential to Corporate Existence.

In a leading New York case, it was said by Chief Justice Nelson: "The distinguishing feature [of a corporate body], far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act, in fulfillment of the objects of the association, as a single individual. In this way a legal existence, a body corporate, an artificial being, is constituted, the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in effecting it, the operation is conducted with the simplicity and individuality of a natural person. In this

⁴⁸ Warner v. Beers, *supra*.

* Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cumming, Cas. Priv. Corp. 1; *post*, p. 119.

⁴⁹ *Post*, p. 154; dictum of Nelson, C. J., in Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cumming, Cas. Priv. Corp. 1.

⁵⁰ *Post*, p. 440; Thomas v. Dakin, *supra*.

consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential are those which are indispensable to mold the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, the powers and faculties that may be conferred are various,—limited or enlarged, at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity (1) to have perpetual succession under a special name, and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued, by its corporate name as an individual; and (3) to receive and enjoy in common grants of privileges and immunities.”⁵¹

The Distinguishing Characteristic of a Corporation.

As we have seen in the preceding pages, many of the incidents of a corporation are not essential, and many of the essential attributes may also exist in the case of a common partnership or unincorporated joint-stock association. It is important, therefore, to find some characteristic of corporations that can be relied upon as a distinguishing mark. The only feature that can be thus relied upon is the existence of the corporation as an entity separate and distinct from the members who compose it. “The most peculiar and strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence.”⁵²

⁵¹ Thomas v. Dakin, 22 Wend. (N. Y.) 9, 1 Cumming, Cas. Priv. Corp. 1. To the same effect, see 1 Kyd, Corp. 70; Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457, 473.

⁵² Per Verplanck, Senator, in Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cumming, Cas. Priv. Corp. 5, W. D. Smith, Cas. Corp. 3. See, also, Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293. In Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029, 1 Cumming, Cas. Priv. Corp. 26, W. D. Smith, Cas. Corp. 13, Shep. Cas. Corp. 5, the question arose whether a British insurance company was a corporation or not, within the meaning of a Massachusetts statute imposing a tax on foreign corporations. The supreme court of the United States, after pointing out that the company had a distinctive and artificial name by which it could make contracts; that there was a statutory provision by which it could sue and be sued in the name of one of its officers as the representative of the whole body, which would be bound by the judgment rendered in such suit; that there was a provision for perpetual succession by the transfer and transmission of the shares of its capital stock, where-

Unincorporated Joint-Stock Companies.

A joint-stock company is an unincorporated association of individuals for business purposes, resembling an ordinary partnership in many respects, but which, unlike an ordinary partnership, has a common fund or capital stock, divided into shares, which are apportioned among the members in proportion to their respective contributions, and which are assignable by the owner without the express consent of the other members. "The words 'joint-stock company' have never been used as descriptive of a corporation created by special act of the legislature, and authorized to issue certificates of stock to its shareholders. They describe a partnership made up of many persons acting under articles of association, for the purpose of carrying on a particular business, and having a capital stock, divided into shares transferable at the pleasure of the holder."⁵³ These associations are nothing but partnerships, and except in so far as the legislature has conferred special rights and privileges upon the members, they are subject to all the liabilities of partners.⁵⁴ Both in England and in this country statutes have been enacted conferring upon joint-stock companies many faculties possessed by corporations, and for this reason the resemblance between corporations and joint-stock companies is very close. It is often difficult to distinguish them. The distinction, however, is important.

Joint-stock companies are formed solely by agreement between the associates, and rest upon their common-law right to contract with each other, and do not depend at all, as in the case of a corporation, upon license or authority from the state. They are merely a peculiar kind of partnership.⁵⁵

They do not act like a common partnership, in which each partner is the agent of the others in conducting the firm business; but

by new members might be introduced in the place of those who might die or sell out; that its existence as an entity separate and apart from the shareholders was recognized by the act of parliament in enabling it to sue its shareholders, and be sued by them,—held that these attributes made the body a corporation, notwithstanding the act of parliament creating it declared that it should not be so regarded.

⁵³ Attorney General v. Mercantile Marine Ins. Co., 121 Mass. 524, 526.

⁵⁴ Hedge & Horn's Appeal, 63 Pa. 273, where it is said that a joint-stock company is a partnership, the capital of which is divided into shares, so as to be transferable without the express consent of all the co-partners. And see Hoadley v. County Com'rs, 105 Mass. 519, 526; Butterfield v. Beardsley, 28 Mich. 412; Wells v. Gates, 18 Barb. (N. Y.) 554; Rickart v. People, 79 Ill. 85.

⁵⁵ People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183, and 2 Cumming, Cas. Priv. Corp. 2; Hoadley v. County Com'rs, 105 Mass. 519, 526.

they generally act by a board of trustees or directors, like a corporation, the shareholders having no power to bind the other members.⁵⁶

It is generally provided by statute that, when a cause of action accrues in favor of or against a joint-stock company, action may be brought by or against it in the name of a certain officer. In the absence of such a provision, all the members would have to be made parties as in the case of an ordinary partnership.⁵⁷

As a joint-stock company is a partnership, the members, however numerous, are subject to all the ordinary liabilities of partners, except in so far as their liability may be limited by agreement or by statute. They must generally be sued as partners, and each member is personally liable for all the debts of the company after the joint assets are exhausted.⁵⁸ This liability, however, may be limited by statute, or even by agreement between the associates if known to the person dealing with the company, without changing the company into a corporation. And, as has been seen, members of a corporation may, by statute, be made liable for its debts.⁵⁹

As shown above, the shares in a joint-stock company are transferable by the holder without the consent of his associates. So, on the death of the holder, they may pass like other property. These associations, therefore, have the faculty of succession.⁶⁰

How, then, it may well be asked, are we to always distinguish such an association from a corporation? The New York court has held that the distinction is in the fact "that the creation of the corporation merges in the artificial body, and drowns in it the individual rights

⁵⁶ *Burnes v. Pennell*, 2 H. L. Cas. 520; *Bray v. Farwell*, 81 N. Y. 600. The reason that each member of a common partnership may thus bind the others is because, by carrying on the business jointly as a firm, the members hold out to the world that each has authority to manage the partnership concerns. It could be stipulated, however, even in an ordinary partnership agreement, that only a certain member shall have authority to bind the firm, and such a stipulation would be effectual as against all persons with notice of it. Since a joint-stock company notoriously conducts its business only through its board of trustees or directors, the members, as such, have no power to bind it. Every person has notice of this. *Burnes v. Pennell*, *supra*.

⁵⁷ *Williams v. Bank*, 7 Wend. (N. Y.) 539, 542. Cf. *F. R. Patch Mfg. Co. v. Capeless* (Vt.) 63 Atl. 938.

⁵⁸ *Taft v. Ward*, 106 Mass. 518; *Tappan v. Bailey*, 4 Metc. (Mass.) 529; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Frost v. Walker*, 60 Me. 468; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Butterfield v. Beardsley*, 28 Mich. 412; *Robbins v. Butler*, 24 Ill. 387.

⁵⁹ *Ante*, p. 16.

⁶⁰ See *Burnes v. Pennell*, 2 H. L. Cas. 520; *Tenney v. Protective Union*, 87 Vt. 64; *Willis v. Chapman*, 68 Vt. 459, 35 Atl. 459.

and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force." ⁸¹ "A joint-stock company," it has been said, "is a partnership, with some of the powers of a corporation." ⁸²

CORPORATION AS A "PERSON," "CITIZEN," ETC.

9. When the reason and design of a statutory or constitutional provision, reserving or conferring a right or remedy, or imposing a duty or liability, upon "persons," "citizens," "inhabitants," etc., applies to corporations, they are within the scope of the statute or constitution, though not specially referred to.

A corporation, though a collection of individuals, has, as we have seen, a separate and distinct individuality. Though it is an artificial being, a mere creature of the legislature, it is in law a person,—an artificial person. It is therefore held to be a "person," within the meaning

⁸¹ People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183, and 2 Cumming, Cas. Priv. Corp. 2. And see Warner v. Beers, 23 Wend. (N. Y.) 103, 1 Cumming, Cas. Priv. Corp. 5, W. D. Smith, Cas. Corp. 3.

⁸² People v. Coleman, supra. In this case it was said: The distinction between a corporation and an unincorporated joint-stock association is "that the creation of the corporation merges in the artificial body, and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. * * * The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members; and, on the other, the joint-stock companies have been clothed with most of the corporate attributes; but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two. We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new, or retention of the old, liability by an affirmative enactment which avoids the inherent effect of the corporate creation. In the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members. The debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liabilities of its corporators. The creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other, from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but

of statutes, using that term when the purpose and reason of the law include corporations as well as natural persons.⁶³ Thus, where a statute prohibited any "person" from engaging in the business of banking, except under certain circumstances, but did not expressly refer to corporations, it was held that they were included under the term "person."⁶⁴ The rule may be laid down that whenever a statute conferring a right or remedy, or imposing a duty or liability, upon "persons," applies in reason and design to corporations, but not otherwise, they are to be deemed included, though not specially mentioned.⁶⁵ The same is true of statutes using the word "inhabitant" or the word "occupier."⁶⁶ On the same principle, a corporation may be regarded as a "citizen," within the meaning of a statute using that term, though it does not expressly refer to corporations. The statute is to be construed as referring to them, if they are within its reason and design, but not otherwise. Thus, a corporation is to be deemed a "citizen," within the meaning of the acts of congress defining the jurisdiction of the federal courts.⁶⁷ But it is not a "citizen," within the meaning of the provision of the federal constitution that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."⁶⁸

without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say, in *Van Aernam v. Bleistein*, 102 N. Y. 360, 7 N. E. 537, that a joint-stock company is a partnership, with some of the powers of a corporation." See *Oliver v. Insurance Co.*, 100 Mass. 531; *Bray v. Farwell*, 81 N. Y. 600

⁶³ Ang. & A. Corp. § 6.

⁶⁴ *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 858, 8 Am. Dec. 243.

⁶⁵ *People v. Utica Ins. Co.*, supra; *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; *School Directors v. Carllsle Bank*, 8 Watts (Pa.) 289; *State v. President & Directors of Bank of Maryland*, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; *Fisher v. Manufacturing Co.*, 10 Wis. 351; *Planters' & Merchants' Bank v. Andrews*, 8 Port. (Ala.) 404; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Grand Gulf Bank v. Archer*, 8 Smedes & M. (Miss.) 151; *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Grat. (Va.) 655, 65 Am. Dec. 254; *Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich*, 153 Mass. 42, 26 N. E. 239. A corporation is a person, within the meaning of the constitutional provision that no state shall deny to any "person" within its jurisdiction the equal protection of its laws. *Pembina Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051; *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; post, p. 606.

⁶⁶ 2 Inst. 703; *Rex v. Gardner*, 1 Cowp. 79; *Gormully & Jeffrey Manuf'g Co. v. Pope Manuf'g Co.* (C. C.) 34 Fed. 818; post, p. 634.

⁶⁷ Post, p. 66.

⁶⁸ Post, p. 606.

KINDS OF CORPORATIONS.**10. Corporations may be classified as follows:**

- (a) According to their membership, they are sole or aggregate.**
 - (1) Corporations sole are composed of only one member at a time.**
 - (2) Corporations aggregate are composed of more than one member.**
- (b) According to their object, they are ecclesiastical, eleemosynary, or civil.**
 - (1) Ecclesiastical corporations, in England, are such as are created to carry out some religious object, and consist of spiritual members.**
 - (2) Eleemosynary corporations are such as are created to carry out some charitable object.**
 - (3) Civil corporations comprise all corporations other than those defined above.**
- (c) Civil corporations are divided into public and private corporations.**
 - (1) Public corporations are such as are created for the purpose of government and the management of public affairs, like cities and villages, etc., and banks, hospitals, etc., founded by the state, and managed by it for governmental purposes.**
 - (2) Private corporations are such as are created for private purposes, as manufacturing, banking, and railroad corporations. Religious and eleemosynary corporations are also included.**
- (d) Civil corporations are again divided into stock and nonstock corporations.**
 - (1) In stock corporations, membership, with its attendant rights, privileges, and liabilities, is determined solely by the ownership of stock.**
 - (2) In nonstock corporations, membership depends upon the consent and agreement of the associates.**

11. Quasi corporations are bodies having some, but not all, of the powers and faculties of a corporation.***Sole and Aggregate Corporations.***

A corporation sole consists of a single member only at one time. When he dies, or for any other reason ceases to be a member, there is some other person who takes his place, so that the corporation, though it may consist of only one natural person, has perpetual or continuous succession.⁶⁶ The sovereign of England has always been regarded as a corporation sole, because of the office, which is clothed with perpetuity. A bishop, dean, parson, and vicar are also given in the English books as instances of corporations sole, and they and their successors take the corporate property and privileges in succes-

⁶⁶ As to the distinction between corporations sole and aggregate, see *Overseers of Poor of City of Boston v. Sears*, 22 Pick. (Mass.) 122.

sion.⁷⁰ In this country the governor of a state has been held a quasi sole corporation.⁷¹ There are also instances in the books of ministers of a parish, seised of parsonage lands in the right of the parish, being held to be corporations sole.⁷² For certain purposes, also, public officers have at times been expressly or impliedly created corporations sole by statute.⁷³ Unless authorized by statute, a corporation sole cannot take personal property in succession, but their capacity in this respect is limited to real property.⁷⁴

In this country corporations sole are very rare. Almost all of our corporations are aggregate; that is, they consist of more than one member at a time.⁷⁵ Private civil corporations are all aggregate. The legislature would, doubtless, have the power to create a sole corporation for private business purposes; but it is perhaps safe to say that it will never do so. It may happen in a stock corporation that, by the purchase of all the stock, the membership may be reduced to one person; but this would not make it a corporation sole. The several shares would be treated as distinct, and liable to be again distributed by the sole owner.*

Religious, Eleemosynary, and Civil Corporations.

In English law, corporations are divided into ecclesiastical and lay. The former were those of which the members were spiritual persons, and the object of the institution was also spiritual.⁷⁶ In this country we have no strictly ecclesiastical corporations in the sense of the English law. But we have religious corporations. These are private civil corporations created for the purpose of holding property in succession for advancing the particular tenets and articles of faith which the corporation was organized to uphold and advance.

⁷⁰ 1 Bl. Comm. 469; 2 Kent. Comm. 273.

⁷¹ Governor v. Allen, 8 Humph. (Tenn.) 176. And see State v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

⁷² Weston v. Hunt, 2 Mass. 500; Inhabitants of First Parish in Brunswick v. Dunning, 7 Mass. 445; Terrett v. Taylor, 9 Cranch (U. S.) 43, 46, 3 L. Ed. 650. Such a corporation exists at this day by statute in Kentucky, and perhaps in other states. See McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649.

⁷³ Thus, when a statute directs bonds for the public benefit to be made payable to a public officer, the officer is the real obligee, and the successor in office, whether described eo nomine in the statute or bond or not, may maintain an action on the bond, since the officer is quoad hoc a corporation sole. See Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Jansen v. Ostrander, 1 Cow. (N. Y.) 670.

⁷⁴ 2 Kent, Comm. 273, 274.

⁷⁵ Overseers of Poor of City of Boston v. Sears, 22 Pick. (Mass.) 122.

* Post, p. 233.

⁷⁶ 2 Kent, Comm. 274.

They are mere trustees of the property, and cannot divert it to other purposes.⁷⁷

Lay corporations are divided into eleemosynary and civil corporations. Eleemosynary, or charitable, corporations are like religious corporations, except that the property is held in trust for certain designated charities. Their object is to provide for the perpetual distribution, or continuous distribution for a certain period, of the bounty of their founders to such objects as they direct. Hospitals, asylums, colleges, and universities are examples of eleemosynary corporations.⁷⁸

All other corporations than ecclesiastical and eleemosynary are called "civil." Indeed, with us, religious corporations are civil.

Public and Private Corporations.

By far the most important division of corporations is into public and private. It is of the latter class only that we are to treat. As between these two classes of corporations, there is a real divergence, both in the modes of operation, and in the principles of law which govern their acts, and their rights and obligations. Public corporations are such as are created for the purposes of government and the management of public affairs. Private corporations are those founded for the management of affairs in which the members are interested as private persons. Counties, cities, towns, and villages are examples of public corporations. These are also called municipal corporations.

A bank, a hospital, or other institution may be a public, as distinguished from a private, corporation, and therefore within the absolute control of the legislature. If a corporation is founded for a public purpose, and the entire interest therein belongs to the government, it is a public corporation; but not if there are any private owners of stock or shares therein. A bank created by the government

⁷⁷ Van Houten v. McKelway, 17 N. J. Eq. 126; Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666; Robertson v. Bullions, 11 N. Y. 243. See Silsby v. Barlow, 16 Gray (Mass.) 329. Where there is a division in a church, and part—even a majority—of the members secede, that portion of the church which remains in full connection with the body under which they were organized as a congregation continues the corporate existence, and is entitled to all the property and privileges of the corporation. Baker v. Fales, 16 Mass. 488; Gable v. Miller, 10 Paige (N. Y.) 627.

⁷⁸ Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, 1 Cumming, Cas. Priv. Corp. 490, W. D. Smith, Cas. Corp. 148, Shep. Cas. Corp. 248; American Asylum v. President, Directors, etc., of Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112; Trustees of Phillips Academy v. King, 12 Mass. 546; Board of Education v. Greenbaum, 39 Ill. 609; Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 378; Bakewell v. Board (Ill. Sup.) 33 N. E. 186.

for its own purposes, and whose stock or shares are owned exclusively by the government, would be a public corporation; but a bank whose stock is owned partly by private persons is a private corporation, although it is erected by the government, and its object and operations partake of a public nature.⁸⁰ So, also, a hospital, asylum, college, university, or other charitable institution, created and endowed by the government alone for general charity, is a public corporation; but a hospital or asylum or institution of learning which is founded and endowed in whole or in part by private persons, though partly endowed by the government, is a private eleemosynary corporation, however general the charity may be.⁸¹ Insurance, canal, railroad, steamship, bridge, and turnpike companies, the shares in which are owned in whole or in part by private individuals, are private corporations, though their uses are public in their nature.⁸² These are sometimes called quasi public corpora-

⁸⁰ 2 Kent, Comm. 276; Per Story, J., in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 669, 4 L. Ed. 629; *Bank of U. S. v. Planters' Bank*, 9 Wheat. (U. S.) 907, 6 L. Ed. 244; *Miners' Bank v. U. S.*, 1 G. Greene (Iowa) 553, 561; *Turnpike Co. v. Wallace*, 8 Watts (Pa.) 316; *Attorney General v. Simonton*, 78 N. C. 57; *President & Directors of State Bank v. Brown*, 1 Scam. (Ill.) 106. Compare *Bank of South Carolina v. Gibbs*, 3 McCord (S. C.) 377; *Bank of Alabama v. Gibson's Adm'rs*, 6 Ala. 814. See 1 Thomp. Corp. § 24. A bank is not a public corporation because the state holds stock in it, if any stock is held by private individuals. "When a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Bank of U. S. v. Planters' Bank*, supra.

⁸¹ *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 630, 667, 4 L. Ed. 629, 1 Cumming, Cas. Priv. Corp. 490, W. D. Smith, Cas. Corp. 148, Shep. Cas. Corp. 248; *Regents v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; *State v. Maryland Institute for Promotion of Mechanic Arts*, 87 Md. 643, 41 Atl. 126; *Board of Education v. Greenbaum*, 39 Ill. 609; *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378; *Head v. University of Missouri*, 47 Mo. 220; *Society for the Propagation of the Gospel v. Town of New Haven*, 8 Wheat. (U. S.) 464; *Board of Trustees for Vincennes University v. State*, 14 How. 268, 14 L. Ed. 416; *Downing v. Board*, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; *Lane v. Minnesota State Agricultural Soc.*, 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708. See 1 Thomp. Corp. §§ 25, 26.

⁸² *Tinsman v. Railroad Co.*, 26 N. J. Law, 148, 69 Am. Dec. 565; *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139; *Bonaparte v. Railroad Co.*, Baldw. 205, Fed. Cas. No. 1,617; *Ten Eyck v. Canal Co.*, 18 N. J. Law, 200, 37 Am. Dec. 233; *Board of Directors v. Houston*, 71 Ill. 318. See 1 Thomp. Corp. § 27. Contra, where a turnpike corporation consists solely of officers of the state, and is organized solely for the public benefit. *Sayre v. Turnpike Road*, 10 Leigh (Va.) 454.

tions. The trustees or commissioners of public schools and universities are public corporations or quasi corporations.⁸³

A corporation may be a public or quasi public body in respect to some of its functions and powers, and a private corporation in respect to others. Thus, it has been held that a municipal corporation, to which the legislature has given the power to erect waterworks, for the private advantage and emolument of the municipality, is to be regarded quoad hoc a private corporation, and responsible, as such, for injuries inflicted in the management of the work.⁸⁴

Stock and Nonstock Corporations.

Private corporations are also divided into stock and nonstock corporations. In the former the membership, after incorporation, with its attendant rights, privileges, and liabilities, is determined by the ownership of stock. Any stockholder may transfer his stock, and the transferee will become a member, without regard to the consent of the other stockholders. This is the most common kind of private business corporation. In nonstock corporations there are no shares of stock to be transferred. Membership depends upon

⁸³ Trustees of Schools v. Tatman, 13 Ill. 27; Bradley v. Case, 3 Scam. (Ill.) 585; Mobile School Com'rs v. Putnam, 44 Ala. 506; Head v. University of Missouri, 47 Mo. 220; Trustees of University v. Winston, 5 Stew. & P. (Ala.) 17; 1 Thomp. Corp. § 25.

⁸⁴ Bailey v. Mayor, etc., 3 Hill (N. Y.) 531, 38 Am. Dec. 669. In this case it was said that, if powers are granted to a municipal corporation for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; "but if the grant is for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, quoad hoc, is to be regarded as a private company." See, also, De Voss v. City of Richmond, 18 Grat. (Va.) 338, 98 Am. Dec. 646; McOauley v. Mayor, etc., 67 N. Y. 602; Oliver v. City of Worcester, 102 Mass. 489, 490, 3 Am. Rep. 485; City of Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; County of Richland v. County of Lawrence, 12 Ill. 8. Compare Mead v. City of New Haven, 40 Conn. 72, 16 Am. Rep. 14; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302. In De Voss v. City of Richmond, supra, it was held that a municipal corporation, in exercising the power to borrow money and to issue bonds therefor, is not acting in its public capacity, but merely as a private corporation, and that it is therefore responsible as such for the act or default of its agent. And in Oliver v. City of Worcester, supra, a municipal corporation was held liable for injuries to a person from falling into an excavation on the grounds of a building which was only partly used for public purposes, the other part being rented to private individuals. Contra, where the building is used wholly for public purposes. Eastman v. Meredith, supra. And see Hill v. City of Boston, 122 Mass. 351, 23 Am. Rep. 332; Stilling v. Town of Thorp, 54 Wis. 532, 11 N. W. 906, 41 Am. Rep. 60; City of Chicago v. Turner, 80 Ill. 423; Symonds v. Board, 71 Ill. 357; Moulton v. Inhabitants, 71 Me. 269, 36 Am. Rep. 308.

the consent of the associates. Incorporated mutual benefit associations are examples of this kind of private corporation.

Quasi Corporations.

A quasi corporation is a body which has some, but not all, of the powers of a corporation. Towns, counties, and school districts, etc., are not strictly public corporations, but they have some of the powers of a corporation, as the faculty of succession, the power to sue and be sued as a body, etc. For this reason they are called quasi corporations.⁸⁵ Other quasi corporations are overseers of the poor, county commissioners, and other public boards or officers.⁸⁶

⁸⁵ Ang. & A. Corp. §§ 23, 24; *Riddle v. Proprietors*, 7 Mass. 187, 5 Am. Dec. 35; *Town of North Hempstead v. Town of Hempstead*, 2 Wend. (N. Y.) 109; *Inhabitants of Fourth School Dist. v. Wood*, 13 Mass. 199; *Board of Com'rs of Hamilton Co. v. Mighels*, 7 Ohio St. 109; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *McLoud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689; *Gaskill v. Dudley*, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; *Boone, Corp.* § 10; note in 13 Am. Dec. 523.

⁸⁶ *Polk v. Plummer*, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; *Overseers of the Poor v. Sears*, 22 Pick. (Mass.) 122; *Governor v. Allen*, 8 Humph. (Tenn.) 176; *Levy Court v. Coroner*, 2 Wall. (U. S.) 501, 17 L. Ed. 851; *Todd v. Birdsall*, 1 Cow. (N. Y.) 260, 13 Am. Dec. 522; *Vankirk v. Clark*, 16 Serg. & R. (Pa.) 286.

CHAPTER II.

CREATION AND CITIZENSHIP OF CORPORATIONS.

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CREATION—IN GENERAL.

- 12. To the creation or formation of a corporation, the following things are essential:
 - (a) A grant of authority, or charter, from the state.
 - (b) Acceptance of the grant, or an agreement between the state and the corporators.
 - (c) An agreement between the corporators and the corporation.

POWER TO CREATE CORPORATIONS.

- 13. It is essential to the existence of a corporation that it shall have been created or authorized by the state. Mere agreement between the members, as in the case of a partnership, is not enough. In this country such bodies can be created only by or under legislative enactment.
- 14. STATE LEGISLATURES—The state legislatures have absolute and unlimited power to create corporations, except in so far as they may be controlled by restrictions in the state or federal constitution.
- 15. CONGRESS—Congress, acting as the legislature of the United States, has the power to create a corporation, if its existence is an appropriate means of carrying into effect any of the powers conferred upon the United States government by the federal constitution. As the local legislature of the District of Columbia, it has the same power in the District as the state

legislatures have in the states, subject only to the restrictions of the federal constitution.

- 16. TERRITORIAL LEGISLATURES**—Territorial legislatures, vested with general legislative powers, have the power to create corporations, which will not be affected by the admission of the territory into the Union, and the adoption of a state constitution.
- 17. PRESCRIPTION**—Long-continued use of corporate powers, and acquiescence on the part of the public, may raise a presumption of legislative authority in the case of public, and, it seems, even in the case of private, corporations. These are corporations by prescription.
- 18. DELEGATION OF POWER**—The legislature cannot delegate its power to create corporations, but, in providing for the formation of a corporation, it may allow ministerial acts to be performed by courts or officers.

Individuals, under their right to make contracts and acquire property, have an absolute right to form partnerships, including joint-stock companies, for the purpose of carrying on any lawful business. For this purpose no authority from the state is necessary. But they have no such right to form a corporation, and conduct their business in that privileged mode, by a mere agreement between themselves. A corporation can be created only by the state,—with us, by or under legislative authority.¹ Special authority seems not to have been necessary at one time under the Roman law, but later it was required even under that law;² and authority from the sovereign or state has always been necessary at common law. Lord Coke, in enumerating the things essential to a corporation, states the first to be “Lawful authority of incorporation,” and he says that this may be “by four means,—sc., by the common law, by the king himself, by authority of parliament, by the king’s charter, and by prescription.”³ In England, the king, bishops, parsons, etc., were corporations by the common law. In this country there are no common-law corporations. All corporations, both public and private, are the creatures of the legislature. There are a few corporations in this country which were chartered by the English crown or by parliament before the Revolution, under the colony administration, and whose charters are still recognized.⁴

¹ *Stowe v. Flagg*, 72 Ill. 397; *Medical Inst. v. Patterson*, 1 Denio (N. Y.) 61; *Myers v. Manhattan Bank*, 20 Ohio, 283; *McKim v. Odom*, 3 Bland, Ch. (Md.) 407, 416; *Ang. & A. Corp.* § 66 et seq.

² *Tayl. Corp.* § 4; 1 *Wat. Corp.* § 22.

³ *Sutton’s Hospital Case*, 10 Coke, 29b, 2 *Cumming, Cas. Priv. Corp.* 14.

⁴ *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, 1 *Cumming, Cas. Priv. Corp.* 490, *W. D. Smith, Cas. Corp.* 148, *Shep. Cas. Corp.* 248.

Corporations by Prescription.

In England, both the public and private corporations may exist by prescription; that is, they may have existed for so long a time that the king's consent will be presumed. Blackstone, after mentioning the king, bishops, and other common-law corporations sole, says: "Another method of implication, whereby the king's consent is presumed, is as to all corporations by prescription, such as the city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be well created; for though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one, and that, by the variety of accidents which a length of time may produce, the charter is lost or destroyed." ⁵ The same doctrine has frequently been applied in this country in the case of public corporations. ⁶ There seems to be no good reason for recognizing any distinction in this respect between public and private corporations for both are the creatures of the legislature; and the doctrine has been applied to private corporations also. ⁷ To give rise to this presumption, the acts done must bear the impress of corporate acts; that is, they must be such as corporations are competent, and individuals incompetent, to perform. ⁸

Power of the State Legislatures.

The power of the state legislatures to create corporations, and confer powers and privileges upon them, within the state, is absolute, except in so far as it may be restricted by the state or federal constitution. ⁹ In the absence of constitutional limitations, there is nothing to prevent the legislature from creating a corporation, and conferring exclusive privileges upon it, in consideration of public services, though it may thus create a monopoly. ¹⁰

⁵ 1 Bl. Comm. 473.

⁶ "Municipal corporations," said the Illinois court, "are created for the public good,—are demanded by the wants of the community; and the law, after long-continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence." *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304. And see *People v. Maynard*, 15 Mich. 463, 470; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *Dillingham v. Snow*, 5 Mass. 547.

⁷ 2 Kent, Comm. 276, 277; *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58.

⁸ *Greene v. Dennis*, *supra*.

⁹ *People v. Marshall*, 6 Ill. 672; *Bell v. Bank of Nashville*, Peck (Tenn.) 269. See *Myers v. Manhattan Bank*, 20 Ohio, 283.

¹⁰ *Thomp. Corp.* §§ 647-650. See *State v. Milwaukee Gaslight Co.*, 29 Wis. 454, 9 Am. Rep. 598; *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S.

In all of the state constitutions some limitations on the power of the legislature to create corporations, and grant privileges to them, will be found. In some states, for instance, it is declared that no act of incorporation shall be passed unless with the assent of two-thirds of each house.¹¹ And in most states, as we shall presently see at some length, the legislature is prohibited from creating corporations, with some exceptions, by special act, but must provide for their formation, if at all, by general laws.¹² In most states there is a constitutional provision that no bill passed by the legislature shall contain more than one subject, and that this subject shall be clearly expressed in its title. This applies, of course, to acts in relation to corporations.¹³ The only restrictions upon the power of the several states,

683, 6 Sup. Ct. 265, 29 L. Ed. 510; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. Contra, *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 20. Thus, the legislature may, in the absence of constitutional restrictions, grant a corporation the exclusive privilege of maintaining a railroad in the street. Case of *Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25, 36 Am. Dec. 202. And it may grant a corporation the exclusive privilege of manufacturing and selling illuminating gas in a city, and of constructing works and laying pipes for such purpose. *State v. Milwaukee Gaslight Co.*, supra; *Louisville Gas Co. v. Citizens' Gaslight Co.*, supra; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Manuf'g Co.*, supra. Contra, *Norwich Gaslight Co. v. Norwich City Gas Co.*, supra. And it may grant the exclusive privilege of supplying a city with water, and of constructing works and laying pipes for that purpose. *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 2 L. Ed. 525. In most states, perhaps, there are constitutional provisions prohibiting the legislature from granting exclusive privileges to any man or set of men, except in consideration of public services. Such a provision would not prevent the granting of exclusive privileges, like those referred to above, to water and gas companies, for the services in such cases are public. The legislature, however, could not grant exclusive privileges in matters not of such character. It could not, for instance, allow a corporation to charge a greater rate of interest than is allowed by the general law. *Gordon v. Association*, 12 Bush (Ky.) 110, 23 Am. Rep. 713.

¹¹ See, as to this provision, 1 *Thomp. Corp.* §§ 632-636. Some of the courts have held that this provision is aimed at special acts only, and that it does not prohibit the passing of general incorporation laws by a mere majority vote. *Gifford v. Livingston*, 2 Denio (N. Y.) 380; *Palmer v. Lawrence*, 5 N. Y. 389. Others have held that it covers all laws for the creation of corporations, general as well as special. *Falconer v. Campbell*, 2 McLean, 195, Fed. Cas. No. 4,620; *Green v. Graves*, 1 Doug. (Mich.) 361. It has been held that this provision does not prevent the legislature from creating more than one corporation by the same act, provided the act is passed by the necessary two-thirds majority; and that, therefore, it does not prevent the legislature from passing general laws for the formation of corporations. *Falconer v. Campbell*, supra; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9.

¹² Post, p. 37.

¹³ As to this provision, see 1 *Thomp. Corp.* §§ 607-627. See, also, *State v. Illinois Cent. R. Co.* (C. C.) 33 Fed. 730, 765; *People v. Mahaney*, 13 Mich.

in the creation of corporations, that are to be found in the federal constitution, relate to the purposes for which corporations may be

481; *Astor v. New York Arcade Ry. Co.*, 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789. The provision must receive "a fair and reasonable construction,—one which will repress the evil designed to be guarded against, but which at the same time will not render it oppressive or impracticable." *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589. This provision does not prohibit an act of incorporation from granting various powers; nor does it require all the powers granted to be enumerated in the title. 1 *Thomp. Corp.* § 613. See *Lockhart v. City of Troy*, 48 Ala. 579; *Montgomery Mut. Bldg. & Loan Ass'n v. Robinson*, 69 Ala. 413. While the subject must be expressed in the title, "the adjuncts to that subject, or the *modus operandi*, need not be." *City of Ottawa v. People*, 48 Ill. 233. The constitution "does not require that the subject of the bill must be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of a bill, although in general terms, is all that is required." *Johnson v. People*, 83 Ill. 431. And see *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220. In *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 79, 24 N. W. 361, an act entitled "An act relating to the Mississippi Boom Corporation," which, in addition to provisions relating to the powers and duties of that corporation, embraced a separate section imposing additional duties upon another corporation, was held void as to such section because the subject-matter thereof was not embraced in the title. And in *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102, an act amending an act for the incorporation of manufacturing companies, so as to include corporations for mercantile business, the title of the amended act being "An act for the incorporation of manufacturing companies," and being unchanged, was held void. This clause of the constitution is "construed liberally in favor of the validity of enactments; and the fact that many things of a diverse nature are authorized or required to be done is unimportant, provided that doing of them may fairly be regarded as in furtherance of the general subject of the enactment." *Blake v. People*, 109 Ill. 504.

The following acts have been sustained as embracing only one subject, which was embraced in its title: "An act to incorporate the Firemen's Benevolent Association, and for other purposes," which contain a provision requiring the agents of all foreign insurance companies doing business in Chicago to pay to the association a certain per cent. of all premiums received by them. *Firemen's Benevolent Ass'n v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115. "An act to amend an act entitled 'An act to incorporate the Northwestern University,'" which contained a prohibition against the sale of intoxicating liquors within a certain distance of the university. *O'Leary v. County of Cook*, 28 Ill. 534. An act providing for the incorporation of mutual fire insurance companies, and repealing certain existing acts, which, in the absence of such express repeal, would be repealed by implication. *Telford v. Church*, 66 Mich. 431, 33 N. W. 913. "An act to authorize the organization of annuity, safe-deposit and trust companies," granting to such corporations power to act as guardian, etc. The latter section of the act, said the court, "is but an enumeration of the powers granted to such corporations, and it was never before heard that, in a general law for the organization of a particular class of corporations, the powers granted to them should be detailed in the title of the act." *Minnesota*

formed. No state can create a corporation for a purpose that is expressly or impliedly prohibited by that instrument.¹⁴

Power of Congress and of Territorial Legislatures.

The congress of the United States derives all its powers from the federal constitution, but it is not limited to the powers expressly conferred upon it by that instrument. There is a general clause giving it the power to pass all necessary and proper laws for carrying its powers into execution.* Indeed, it has such power independently of this clause, for a grant of power necessarily implies the grant of all usual and proper means for its execution. It is under this general clause, or the implied grant of power, that congress has the power to establish corporations. The power is nowhere expressly conferred. Congress, then, has the power, acting as the legislative body of the federal government, to create a corporation, when its existence is necessary or proper to enable the federal government to execute the powers expressly or impliedly conferred upon it by the constitution. It can create a corporation as a means, but not as an end.¹⁵ If the

Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418. In *Wardle v. Townsend*, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511, it was held that the title, "An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties," was sufficient to embrace provisions for winding up such companies when insolvent, for their examination by the insurance commissioner, the appointment of a receiver, and the assessment of policy holders to pay liabilities.

The following acts have been held void as embracing more than one subject: An act incorporating, or reviving the charters of, several distinct corporations. *Ex parte Conner*, 51 Ga. 571. Contra, *People v. Ottawa Hydraulic Co.*, 115 Ill. 281, 3 N. E. 413. "An act to provide for the incorporation of merchants' mutual insurance companies and to regulate the business of insurance by merchants' and manufacturers' mutual insurance companies." *Skinner v. Wilhelm*, 63 Mich. 568, 30 N. W. 311. "An act to incorporate the B. G. Park Association" is unconstitutional, as not expressing the subject in the title; the term "park" not being applicable to private inclosures, nor to a game and fish preserve. *Com. v. Hazen*, 207 Pa. 52, 56 Atl. 263. By the weight of authority, an act incorporating a railroad company may also provide for municipal aid. 1 *Thomp. Corp.* § 614; *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 219; *Phillips v. Town of Albany*, 28 Wis. 340; *Mahomet v. Quackenbush*, 117 U. S. 508, 6 Sup. Ct. 858, 29 L. Ed. 982. Contra, *People v. Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280 (but see *Board of Super's v. People*, 25 Ill. 182); *Peck v. City of San Antonio*, 51 Tex. 490.

¹⁴ 1 *Mor. Priv. Corp.* § 14.

* *Const. U. S. art. 1, § 8.*

¹⁵ *McCulloch v. State of Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579. See, as to national corporations, 1 *Thomp. Corp.* §§ 665-683. Under this implied grant of power, congress has created a United States banking corporation. *McCulloch v. State of Maryland*, supra; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204. And see *State v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263. So, under the power to regulate commerce, it has created corporations with power to

creation of a corporation is an appropriate means to carry into effect any of the powers conferred upon the federal government by the constitution, the degree of its necessity is a question within the discretion of congress, and not a question of judicial cognizance.¹⁶

Congress also has the power to create corporations in the District of Columbia, and it has the same power in this respect as the state legislature has in a state, subject only to the restrictions of the federal constitution.¹⁷ In the exercise of this power, however, it acts, not as the legislature of the United States, but as the local legislature of the District.¹⁸

It has been held that territorial legislatures have the power to create corporations under the general legislative powers conferred upon them by congress in the organic act; and a corporation created by a territorial legislature is not affected by the admission of the territory into the Union, and the adoption of a state constitution, but after the change is considered a corporation of the state.¹⁹ Territorial legislatures are now expressly authorized to provide for the formation of corporations by general laws, but prohibited from granting private charters or special privileges.²⁰

A corporation created by the government of the United States is a creature of federal sovereignty alone, and is controllable by, and amenable to, the federal government only.²¹

Delegation of Power by the Legislature.

It was formerly asserted in England that the act of incorporation must be the immediate act of the king himself, and that he could not

construct railways and highways across the various states and territories. *Union Pac. R. Co. v. Lincoln Co.*, 1 Dill. 314, Fed. Cas. No. 14,378; *Thomson v. Pacific R. R.*, 9 Wall. 579, 19 L. Ed. 792; *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Indiana v. United States*, 148 U. S. 148, 13 Sup. Ct. 564, 37 L. Ed. 401. Under the same power, congress may incorporate a company to construct and maintain a bridge over navigable waters between states. *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808.

¹⁶ *McCulloch v. State of Maryland*, supra.

¹⁷ 1 *Thomp. Corp.* § 682; *Hadley v. Freedman's Savings & Trust Co.*, 2 *Tenn. Ch.* 122.

¹⁸ *Id.*

¹⁹ *Vincennes University v. State of Indiana*, 14 *How. (U. S.)* 268, 273, 14 *L. Ed.* 416; *Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 *Sup. Ct.* 208, 28 *L. Ed.* 794; 1 *Thomp. Corp.* § 681.

²⁰ *Rev. St. U. S.* § 1889. A territorial act authorizing the organization of corporations for certain purposes cannot be held invalid or in excess of the powers conferred in territories by congress, when ratified and confirmed by act of congress. *Colorado Springs Co. v. American Pub. Co.*, 97 *Fed.* 843, 38 *C. C. A.* 433.

²¹ *State v. Curtis*, 35 *Conn.* 374, 95 *Am. Dec.* 263.

grant a license to another to create a corporation.²² But the law has since been settled to the contrary, and it is now held that the king may not only grant a license to a subject to create a particular corporation, but may give a general power by charter to erect corporations indefinitely on the principle, "*Qui facit per alium facit per se*;" The person to whom the power is delegated being regarded merely as an instrument in the hands of the government.²³ In this country our federal and state constitutions vest the lawmaking power exclusively in the federal and state legislatures, and the English rule does not obtain. With us, corporations are created by the legislatures, and not otherwise. To establish a corporate body is to enact a law, and no power but the legislature can do this. The maxim, "*Delegata potestas non potest delegari*," applies.²⁴

This principle does not prevent the legislature from delegating the performance of purely ministerial acts in the formation of corporations. Thus, it may enact a general law authorizing persons to form themselves into a corporation by complying with certain formalities, as by filing in a certain court of record, or with the secretary of state or some other officer, a petition setting forth the objects of the proposed corporation, and other facts, and providing for the making of an order by the court directing the petition to be entered of record, or the issuance of a certificate by the secretary or other officer, showing that the statute has been complied with, and declaring that the persons thus seeking to incorporate shall thereupon become a corporation, etc. A corporation thus formed is really created by the legislature, and not in any sense by the court or officer upon whom the ministerial duties are imposed. No discretionary power is conferred upon them. They are merely required to perform ministerial acts, and a writ of mandamus would lie to compel them to do so.²⁵

²² Case of Sutton's Hospital, 10 Coke, 27.

²³ Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Cumming, Cas. Priv. Corp. 42, Ang. & A. Corp. 74, 1 Kyd, Corp. 50, 1 Bl. Comm. 474.

²⁴ 1 Thomp. Corp. §§ 643-646; State v. Simons, 32 Minn. 540, 21 N. W. 750.

²⁵ Franklin Bridge Co. v. Wood, 14 Ga. 80, 1 Cumming, Cas. Priv. Corp. 42; In re New York El. R. Co., 70 N. Y. 327; Heck v. McEwen, 12 Lea (Tenn.) 97; State v. Taylor, 55 Ohio St. 61, 44 N. E. 513; People v. Payn, 161 N. Y. 229, 55 N. E. 849. In Granby Mining & Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246, it was held that, where the powers of a corporation, and the procedure by which it can be brought into existence, are prescribed by the legislature, the fact that the legislature, in the same act, gives such corporation the power to dispose of special stock which is to form no part of the general stock of the corporations, and permits the holders of such special stock to become a distinct corporation, is not such a delegation of legislative power as to render an organization formed under the special stock clause invalid.

GENERAL AND SPECIAL LAWS.

- 19. In the absence of constitutional limitations, corporations may be created under or by either general or special laws. In most states, however, the legislature is prohibited by the constitution from creating corporations, with certain exceptions, otherwise than under general laws.**
- 20. By the weight of authority, such a provision does not prohibit a special act which merely grants additional powers and privileges to an existing corporation, but it does prohibit a special act so amending the charter of an existing corporation as to make it in effect a different corporation.**

Corporations are created either by a special act of the legislature or under a general law. A special act creates a particular corporation. A general law does not of itself directly create a corporation, but authorizes incorporation by providing that any persons who comply with its terms shall thereby become incorporated. A general law authorizing the formation of corporations defines the purposes for which they may be formed, and prescribes the steps that must be taken to form them. It generally requires articles of association to be executed by the incorporators, and filed in some public office or court, and often fixes the minimum number of residents of the state who shall execute such articles. The articles are usually required to set forth the names of the incorporators and their residences, the name by which the proposed corporation shall be known, and its principal place of business, the object and purpose of the association, which, of course, must not be other than is authorized by the law under which it is formed,²⁶ the period of time for which the corporation is to exist, the number of directors, and the names of those who are to act as such until an election is had pursuant to the articles. If the body is to be a stock corporation, it is usually required that the articles shall state the amount of the capital stock, the number of shares, and the amount that is to be paid in before doing business. Of course, the requirements will vary greatly in the different states, and in different statutes in the same state.²⁷ As will presently be shown, the re-

²⁶ Post, p. 60.

²⁷ The following sections taken from a New Hampshire statute (Gen. Laws 1878, c. 152) are a good illustration of a general law:

"Section 1. Any five or more persons of lawful age may, by written articles of agreement, associate together for agricultural, educational, or charitable purposes, or for carrying on any lawful business, except banking and the construction and maintenance of a railroad; and when such articles have been executed and recorded in the office of the clerk of the town in which the principal business is to be carried on, and in that of the secretary of state, they

quirements of the statute must be complied with in order to form a legal corporation.²⁸

Constitutional Restriction.

In most states there is a constitutional provision that corporations, generally with some exceptions, shall not be created or formed by special act, but must be formed under general laws.²⁹ Where there is such a provision as this, the legislature, of course, has no power to create corporations, other than of the kind excepted, by a special act. The object of this provision is obvious. It is chiefly to prevent the granting of special privileges to one body of men, without giving all others the right to obtain them on the same conditions; and perhaps it is partly to prevent bribery and corruption of legislators.

Where the provision of the constitution is that corporations "shall not be created" or "formed" by special act, it prevents the formation of a corporation by the acceptance after the adoption of the constitution of a special act offering a charter passed before its adoption, for "the restraint is plainly imposed upon the creation—the organization—of the corporation itself."³⁰ It is otherwise where the provision is that the legislature shall "pass no special act conferring corporate powers," for here the restraint is only imposed on future legislative action.³¹

The question has often arisen whether a constitutional prohibition against the creation or formation of a corporation by special act prohibits the legislature from passing a special act conferring additional privileges or powers upon a corporation previously created, or amending the charter of an existing corporation. It is sufficiently clear on principle, and has frequently been decided, that, where a corporation has already been created, a special act regulating it, or conferring new and additional grants, privileges, or powers, without changing

shall be a corporation, and such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities of similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.

"Sec. 2. The object for which the corporation is established, the place in which its business is to be carried on, and the amount of capital stock to be paid in, shall be distinctly set forth in its articles of agreement."

²⁸ Post, p. 49.

²⁹ For an index to the constitutional provisions of the various states on this subject, see 10 Cyc. 172.

³⁰ State v. Dawson, 16 Ind. 40, 1 Cumming, Cas. Priv. Corp. 65, W. D. Smith, Cas. Corp. 19, Shep. Cas. Corp. 54; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415. Contra, State v. Hancock, 2 Del. 252, 45 Atl. 851.

³¹ State v. Roosa, 11 Ohio St. 16; State v. Dawson, supra.

the organization of the corporate body, is not within the prohibition.³² It has been held, for instance, that the constitution does not prohibit a special act conferring upon an existing railroad corporation authority to change the line of its road,³³ or to purchase the railroad and franchises of another company;³⁴ nor a special act extending the duration of an existing corporation,³⁵ or changing, or authorizing it to change, its name;³⁶ nor a special act changing the character of an existing corporation, as from a mutual benefit or nonstock corporation to a stock corporation.³⁷ As was said by Judge Sawyer: "The word 'create' has a clear, well-settled, and well-understood signification. It means to bring into being; to cause to exist; to produce; to make, etc. To my apprehension, it appears to be one thing to create, or bring into being, a corporation, and quite another to deal with it as an existing entity—a person—after it is created, by regulating its intercourse, relations, and acts as to other existing persons, natural and artificial."³⁸

The legislature, however, cannot resort to any subterfuge to avoid the constitutional prohibition. If by a special act it undertakes to so amend or alter the charter of an existing corporation as in effect to create a new corporate body, it violates the constitution, and the act is void. "A prohibition from creating corporations by special act undoubtedly does not, in terms, prohibit the legislature from passing a special law altering the charter of an existing corporation; but it is plain that a constitutional provision cannot be avoided, and practically annulled, by a subterfuge. A special law altering the character of an existing corporation, and practically changing it, must therefore be deemed in violation of a constitutional prohibition against the creation of corporations by special act. If this were not so, organizations formed under the general laws might be treated merely as the rough material out of which corporations might afterwards be

³² *Attorney General v. North America Life Ins. Co.*, 82 N. Y. 172.

³³ *Southern Pac. R. Co. v. Orton (O. C.)*, 32 Fed. 457.

³⁴ *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895.

³⁵ *Cotton v. Boom Co.*, 22 Minn. 372. Compare *Logan v. Railroad Co.*, 87 Ga. 533, 13 S. E. 516.

³⁶ *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Hazelett v. Butler University*, 84 Ind. 230; *Attorney General v. Joy*, 55 Mich. 94, 20 N. W. 806. And see *Pacific Bank v. De Ro*, 37 Cal. 538; *Rosenthal v. Madison & I. P. Co.*, 10 Ind. 358.

³⁷ *St. Paul Fire & Marine Ins. Co. v. Allis*, 24 Minn. 75.

³⁸ In *Southern Pac. R. Co. v. Orton*, *supra*. See, also, *Wallace v. Loomis*, 97 U. S. 154, 24 L. Ed. 895; *Attorney General v. North America Life Ins. Co.*, 82 N. Y. 172; *In re New York El. R. Co.*, 70 N. Y. 327; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *State v. Cape Girardeau & S. L. R. Co.*, 48 Mo. 468.

fashioned at pleasure under special acts of the legislature, and the constitutional provision would become an empty form.”³⁹

Some of the cases do not recognize this distinction, but hold broadly that the constitution prohibits a special act granting an existing corporation any new franchises,—“that there is no distinction, as respects the constitutional inhibition, between a grant of corporate powers and privileges and the grant of corporate charters *de novo*.”⁴⁰

A special act waiving a failure to comply with conditions precedent in the attempted organization of a particular corporation under a general law is not unconstitutional under this clause;⁴¹ but it is otherwise if the legislature, by special act, attempts to ratify a claim to corporate existence which is altogether unauthorized.⁴²

In some states the language of the constitution is different from the provision we have been discussing; the legislature being prohibited from passing any special act “conferring corporate powers,” or “granting corporate powers or privileges.” Some of the courts regard this as broader than the prohibition against the “creation” of corporations, and have held that the legislature is thereby prohibited “from either creating corporations, or conferring upon the same corporate powers,” by special act.⁴³ This would seem to be the reasonable construction, but the weight of opinion seems to be against it, and in favor of holding such provisions merely equivalent to the prohibition against their “creation.”⁴⁴

An act is not “special,” within the meaning of the constitutions, if

³⁹ 1 Mor. Priv. Corp. § 12. For cases in which special acts in reference to existing corporations have been held void, see *Ex parte Pritz*, 9 Iowa, 30; *Town of McGregor v. Baylies*, 19 Iowa, 43; *City and County of San Francisco v. Spring Valley Waterworks*, 48 Cal. 493, overruling *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398 (but see the criticism of this case in *Southern Pac. R. Co. v. Orton* [C. C.] 32 Fed. 457, 467); *Green v. Knife Falls Boom Corp.*, 35 Minn. 155, 27 N. W. 924; *Astor v. Railway Co.*, 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789.

⁴⁰ See *Green v. Knife Falls Boom Corp.*, *supra*; *City and County of San Francisco v. Spring Valley Waterworks*, *supra*; *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 560.

⁴¹ *Central Agr. & Mech. Ass'n v. Insurance Co.*, 70 Ala. 120; *State v. Webb*, 110 Ala. 214, 20 South. 462; *McAuley v. Railway Co.*, 83 Ill. 348; *Syracuse City Bank v. Davis*, 16 Barb. (N. Y.) 188.

⁴² *Oroville & V. R. Co. v. Supervisors of Plumas County*, 37 Cal. 354.

⁴³ *Atkinson v. Railroad Co.*, 15 Ohio St. 21. And see *German-American Inv. Co. v. City of Youngstown* (C. C.) 68 Fed. 452. That such a clause prohibits a special act conferring upon an existing corporation the power to issue bonds, see *School Dist. v. Insurance Co.*, 103 U. S. 707, 26 L. Ed. 601.

⁴⁴ *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425; *Brady v. Moulton*, 61 Minn. 185, 63 N. W. 489; *North River Boom Co. v. Smith*, 15 Wash. 188, 45 Pac. 750.

it operates alike and uniformly throughout the state upon like facts. An act, to be general, need not apply to every person or every corporation in the state. It is sufficient if it applies to every person or corporation who or which comes within the relations or circumstances provided for,⁴⁵ if the classification "has some reasonable foundation in the nature of things, and is not arbitrarily made to afford means of evading the constitutional inhibition."⁴⁶ The fact that the legislature expressly declares a special act to be general cannot make it so. If it were held otherwise, it would be an easy matter to defeat the constitutional inhibition.⁴⁷

⁴⁵ 1 Thomp. Corp. §§ 592-602; *Hazelett v. University*, 84 Ind. 230; *Attorney General v. McArthur*, 88 Mich. 204; *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; *Delaware Bay & O. M. R. Co. v. Markley*, 45 N. J. Eq. 139, 16 Atl. 436; *City of Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344. In *Attorney General v. McArthur*, supra, it was held that the constitutional limitation upon the creation of corporations except by general laws does not apply to incorporation acts to enable operations to be carried on in specific localities that cannot be carried on anywhere else. "The great purpose of the provision," said Graves, J., "was to introduce a system of legislation in regard to the institution of corporations which would exclude the corruption and party favoritism which had too often accompanied the method previously in vogue, and to secure, as far as practicable, for all the people of the state, an equality of opportunity and a guard against sectional discriminations. It was determined that corporations of the class in question should owe their erection to general laws, and not to special acts, and, within this principle, that no law, general in form, should be allowed to localize the specific work or business of the corporation within narrower bounds than it would naturally be bound to occupy if not thus localized by enactment. At the same time, it was not designed to hinder the confinement of the specific work or business of the corporation, by the terms of the law, within a given section, in any case when, in consequence of natural conditions, such work or business could not be carried on elsewhere."

⁴⁶ 1 Thomp. Corp. §§ 593, 598; *Atlantic City Waterworks Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427, 15 Atl. 581; *Weinman v. Railway Co.*, 118 Pa. St. 192, 12 Atl. 288; *Thomas v. Railway Co. (C. C.)* 40 Fed. 126, 7 L. R. A. 145. In *Frye v. Partridge*, 82 Ill. 267, an act for establishing a single ferry at a designated point on a particular river was held void as a local and special act.

⁴⁷ *City and County of San Francisco v. Spring Valley Waterworks*, 48 Cal. 493; *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589. Where an act granted to three persons "and their assigns" the exclusive right to supply a town with water, prescribing certain duties, and authorizing the town "to purchase all the works and franchises" granted after 15 years, and a corporation was organized 3 years later and became owner of the franchises through mesne conveyances, and it did not appear that any of the original grantees had any interest in the corporation, or had caused it to be formed, it was held that the original grant was not the creation of a corporation by special act. *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075.

In some states, special laws relating to corporations are prohibited only where general laws can be made applicable. Under such a provision, though there are some decisions to the contrary, it has generally been held that it is exclusively for the legislature, and not for the courts, to say whether a special law is necessary.⁴⁸

Constitutional prohibitions against creating corporations, or granting corporate powers, by special act, are not to be construed as retrospective, so as to render invalid and take away a previous grant of corporate powers to corporations organized and in actual operation.⁴⁹

INTENTION TO CREATE A CORPORATION.

21. No particular form of words is necessary to the creation of a corporation. All that is necessary is that such an intention on the part of the legislature shall clearly appear from the act.

In creating a corporation the legislature generally uses language which admits of no doubt, as the words "incorporate," "found," "erect," etc.; but no particular form of words is ever necessary.⁵⁰ All that is necessary is that it shall appear that the legislature intended to create a corporation. Such an intention is shown whenever all the powers and faculties essential to the existence of a corporation are conferred, though the words "corporation" or "incorporate" are not used in the statute.⁵¹ "Whenever it is apparent that the intention of the legislature will be defeated if certain parties are not found to possess corporate powers, they will be held to be created a corporation."⁵² Thus, a grant to certain persons by the state, of property

⁴⁸ *Carpenter v. People*, 8 Colo. 116, 5 Pac. 828; *Gentile v. State*, 29 Ind. 409; *State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *Knowles v. Board of Education*, 83 Kan. 692, 7 Pac. 561; *State v. County Court*, 50 Mo. 317, 11 Am. Rep. 415; *Evans v. Job*, 8 Nev. 322. Contra, *State v. Mayor, etc., of Newark*, 40 N. J. Law, 71; *Ex parte Pritz*, 9 Iowa, 30; *Von Phul v. Hammer*, 29 Iowa, 222; *Thomas v. Board of Com'rs*, 5 Ind. 4 (since overruled). In several states the question is expressly left to the judgment of the legislature. *People v. Bowen*, 21 N. Y. 517; *Smith v. Havens Relief Fund Soc. (Sup.)* 90 N. Y. Supp. 168. It was formerly so in Illinois. *Johnson v. Railroad Co.*, 23 Ill. 202.

⁴⁹ *State v. Illinois Cent. R. Co. (C. C.)* 33 Fed. 730, 769.

⁵⁰ 10 Coke, 30, 2 Cumming, Cas. Priv. Corp. 14.

⁵¹ *Thomas v. Dakin*, 22 Wend. (N. Y.) 9, 1 Cumming, Cas. Priv. Corp. 1; *Conservators of River Tone v. Ash*, 10 Barn. & C. 349, 1 Cumming, Cas. Priv. Corp. 23; *Dean v. Davis*, 51 Cal. 406; *Mahony v. Bank of State*, 4 Ark. 620; *Smith v. Havens Relief Fund Soc. (Sup.)* 90 N. Y. Supp. 168; *Sibley v. Penobscot Lumbering Ass'n*, 93 Me. 399, 45 Atl. 293.

⁵² *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489.

or powers which they cannot hold or exercise unless they have a corporate character, will confer such a character.⁵³ If no intention to create a body corporate is expressed, and the powers conferred may be exercised as well by an unincorporated association, an intention to create a corporation will not be inferred.⁵⁴

RATIFICATION OF CLAIM TO CORPORATE EXISTENCE.

22. Recognition and ratification by the legislature of a claim of corporate existence render the body a corporation. But where the claim is wholly without authority, and the constitution prohibits the creation of corporations by special act, recognition and ratification by special act are not effectual.

Express ratification by the legislature of a claim to corporate existence, or an implied ratification by recognition of the claim and of the pretended corporation as a legally existing one, as by empowering it to do acts which only a corporate body can do, renders the body a legal corporation as fully as if originally created by the legislature; and this is true even where the claim is without any authority whatever.⁵⁵ And such a ratification relates back, and ren-

⁵³ *Bow v. Allenstown*, supra; *Dean v. Davis*, 51 Cal. 410; *Dunn v. University*, 9 Or. 357; *Town of North Hempstead, v. Town of Hempstead*, 2 Wend. (N. Y.) 109. "Whenever the language manifests the intention of the government to confer corporate privileges, they may be conferred without the adoption of any particular technical phraseology or minutely descriptive language. It is indeed a principle of law that has been often acted on, that where rights, privileges, and powers are granted by law to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed, or such powers exercised, without acting in a corporate capacity, such associations are, by implication, a corporation, so far as to enable them to exercise the rights and powers granted." *Ang. & A. Corp.* §§ 77, 78.

⁵⁴ Thus, where the executive council of Massachusetts passed a resolution as follows: "Advised, that a company of artillery be established by Watertown, agreeable to military law,"—it was held that the intention to make the company a corporation could not be inferred. *Shelton v. Banks*, 10 Gray (Mass.) 401. And see *Stebbins v. Jennings*, 10 Pick. (Mass.) 172.

⁵⁵ *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 804; *Illinois G. T. R. Co. v. Cook*, 29 Ill. 237; *People v. Farnham*, 35 Ill. 562; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621; *Basshor v. Dressel*, 34 Md. 503; *Attorney General v. Joy*, 55 Mich. 94, 20 N. W. 806; *St. Louis R. Co. v. Northwestern St. L. Ry. Co.*, 2 Mo. App. 69; *People v. Perrin*, 56 Cal. 345; *Williams v. Bank*, 2 Humph. (Tenn.) 339; *Society for Propagation of Gospel in Foreign Parts v. Town of Pawlet*, 4 Pet. (U. S.) 480, 501, 7 L. Ed. 927; *Atlantic & P. R. Co. v. City of St. Louis*, 66 Mo. 228; *Boykin v. State*, 96 Ala. 16, 11 South. 66; *McDougald v. Bellamy*, 18 Ga. 411; *State v. Webb*, 110 Ala. 214, 20 South. 462; *Town of Andes v. Ely*, 158 U. S. 812, 15 Sup. Ct. 954, 39 L. Ed. 996. Compare *People*

ders previous acts of the body as a corporation valid corporate acts.⁵⁶ In like manner, failure to comply with conditions precedent in an attempted organization of a corporation under an act of the legislature may be waived by the legislature, and so cured, in the case of any particular corporation, by a statute expressly approving and ratifying its organization, or impliedly doing so by recognizing it as valid.⁵⁷ To constitute a ratification of a claim to corporate existence, it must, of course, clearly appear that the legislature intended to recognize the corporation as existing.⁵⁸

As was stated in a former section, a special act waiving a failure to comply with conditions precedent in the attempted organization of a corporation under a general law is not a violation of the constitutional prohibition against the "creation" of corporations by special act; but it is otherwise if the legislature, by special act, attempts to ratify a claim to corporate existence that is altogether unauthorized.⁵⁹

AGREEMENT BETWEEN CORPORATION AND STATE—ACCEPTANCE OF CHARTER.

23. It is essential to the formation of a private corporation that there shall be consent on the part of the persons composing it, as well as on the part of the state. There must be an agreement between the corporators in their collective capacity, or the corporation, and the state. Therefore—

- (a) When a charter is offered by the legislature, it must be accepted, to have any effect.**
- (b) Until acceptance, the state may withdraw the offer, as by repeal of the law, or adoption of a constitutional provision rendering it void.**
- (c) The offer will lapse because not accepted within a specified time, or within a reasonable time where no time is specified.**
- (d) The charter must be accepted, if at all, unconditionally and according to its terms, and by those persons to whom it is made.**
- (e) In the absence of provision to the contrary, acceptance of a charter may be presumed from acts of the corporators; and it will**

v. Kingston & M. Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551. An act amending the charter of an alleged corporation, being a recognition of its corporate existence, cures any defects in the original incorporation. Snell v. City of Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858.

⁵⁶ See the cases cited above.

⁵⁷ Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; McAuley v. Railway Co., 83 Ill. 348; Kanawha Coal Co. v. Coal Co., Fed. Cas. No. 7,606; Smith v. Havens Relief Fund Soc. (Sup.) 90 N. Y. Supp. 168.

⁵⁸ Thornton v. Railway Co., 123 Mass. 32, 1 Cumming, Cas. Priv. Corp. 462; Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285.

⁵⁹ Ante, p. 40, and cases there cited.

be presumed where they organize, and proceed to execute the powers conferred.

24. The above rules apply equally to acts of the legislature amending existing charters.

It is commonly said that corporations are created by an act of the sovereign,—in this country, by an act of the legislature,—and in a sense this is true. But it is not to be understood from this that the legislature can bring a private corporation into existence of its own accord, and without the consent of the members who compose it. The consent of the legislature is essential to the existence of a corporation; but it is equally essential, in the case of private corporations, that there shall be consent upon the part of the persons incorporated. The charter of a private corporation is a contract between the corporation and the state; and we may therefore apply to the formation of a private corporation the principles of law governing offer and acceptance in the formation of other contracts.

If persons apply to the legislature for a charter, this is sufficient evidence of consent on their part, and, when the charter is granted, no acceptance of it by them, other than will be implied from their previous application, need be shown.⁶⁰ Indeed, they may be considered as having made an offer, and the state as having accepted it. If, however, without such application, the legislature offers a charter, either to particular persons by a special act, or to persons or a class of persons generally by a general law, an acceptance must be shown. Until acceptance, the offer of a charter, either by a general or a special law, can have no effect whatever.⁶¹ An act of the legislature

⁶⁰ *Perkins v. Sanders*, 56 Miss. 733; *Society of Middlesex Husbandmen & Manufacturers v. Davis*, 8 Metc. (Mass.) 183; *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106. By incorporating under a general incorporation act, the corporation accepts the provisions of such act as part of its charter. *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

⁶¹ *State v. Dawson*, 16 Ind. 40, 1 Cumming, Cas. Priv. Corp. 65, W. D. Smith, Cas. Corp. 19, Shep. Cas. Corp. 54; *Smith v. Silver Val. Min. Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; *Bagg's Case*, 1 Rolle, 224; *Hammond v. Jethro*, 2 Brownl. & G. 100; *Rex v. Amery*, 1 Term R. 575; *Rutter v. Chapman*, 8 Mees. & W. 25; *Falconer v. Campbell*, Fed. Cas. No. 4,620; *Ellis v. Marshall*, 2 Mass. 269, 8 Am. Dec. 49; *Yeaton v. Bank of Old Dominion* 21 Grat. (Va.) 593; *President, etc., of Lincoln & Kennebec Bank v. Richardson*, 1 Greenl. (Me.) 79, 10 Am. Dec. 34; *Shortz v. Unangst*, 3 Watts & S. (Pa.) 45; *Haslett's Ex'rs v. Wotherspoon*, 1 Strob. Eq. (S. C.) 209; *Willis v. Chapman*, 68 Vt., 35 Atl. 459. "The mere grant of a charter, where it does not appear upon the face of the incorporating act, or otherwise, that the named corporators applied for it, does not create the corporate body. Something more must be done. There must be at least an acceptance of the grant

authorizing persons to become a body corporate by complying with certain terms and conditions is, until accepted by the persons authorized, nothing but an offer on the part of the state, which may be withdrawn by it at any time; and it is withdrawn, so as to be no longer open for acceptance, by a repeal of the act by the legislature, or by the adoption of a constitutional provision rendering such an act void.⁶²

It is also the rule in the formation of corporations, as it is in the formation of contracts generally, that the offer of a charter by the state must be accepted according to its terms. It cannot be accepted conditionally or on terms varying from the offer, nor can it be accepted in part and rejected in part, unless this is allowed by the act.⁶³ On the same principle, the offer, if made to particular persons, must be accepted by them. If it appears to be the intention that all shall accept, it cannot be accepted by a part, only, of those to whom it is offered.⁶⁴ General laws authorizing the formation of corporations are general offers to any persons who may bring themselves within their provisions. If conditions precedent are prescribed in the statute, or certain acts are required to be done, they are terms of the offer, and must be complied with.⁶⁵ The state's offer of a charter must be accepted within the time specified in it, or, if no time for acceptance is specified, it must be accepted within a reasonable time. If it is not so accepted, the offer will lapse, and will be no longer open for acceptance.⁶⁶

The acceptance of a charter may be inferred from the acts of the corporators; and a written instrument or note of acceptance is not indispensable, unless made so by the terms of the act.⁶⁷ Any act on

by a majority of the corporators before corporate life and existence can begin." Per Miller, J., in *Smith v. Mining Co.*, *supra*.

⁶² *State v. Dawson*, *supra*; *Aspinwall v. Davless County Com'rs*, 22 How. (U. S.) 364, 16 L. Ed. 296; *Gillespie v. Railroad Co.*, 17 Ind. 243. Ante, p. 38.

⁶³ *Rex v. Westwood*, 4 Barn. & C. 781, 7 Bing. 1; *Lyons v. Railroad Co.*, 32 Md. 18, 29.

⁶⁴ *Ang. & A. Corp.* 25; *Cook, Stock, Stockh. & Corp. Law*, § 649; *Mor. Priv. Corp.* § 22; *Rex v. Amery*, 1 Term R. 589. Where an act declared that certain persons, their associates and successors, were made a corporation under the name of the "A. Reservoir Company," and one person named, apparently without objection of the others, with seven not named, met, accepted the act, adopted by-laws, etc., it was held that the persons who took part became a corporation under the designated name. *McGinty v. Athol Reservoir Co.*, 155 Mass. 183, 29 N. E. 510.

⁶⁵ Post, p. 49; *Fire Department of New York v. Kip*, 10 Wend. (N. Y.) 266; *Quinlan v. Railway Co.*, 89 Tex. 356, 34 S. W. 738.

⁶⁶ *State v. Bull*, 16 Conn. 179; *Bonaparte v. Railroad Co.*, 75 Md. 340, 23 Atl. 784.

⁶⁷ *Rex v. Amery*, 1 Term R. 575; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64, 70, 6 L. Ed. 552; *Gleaves v. Turnpike Co.*, 1 Sneed (Tenn.) 491.

the part of the incorporators, which shows an unequivocal intention to accept, is sufficient; as, for instance, where they proceed to execute the powers conferred by the charter offered them.⁶⁸ If such acts are shown, acceptance will be presumed.⁶⁹

Act Amending Charter.

The rule that a charter must be accepted before it can have any effect applies to acts of the legislature extending a charter that has expired, or is about to expire.⁷⁰ It also applies to acts amending existing charters under a right reserved to the state when the charter was granted;⁷¹ for, though the state may reserve the right to amend the charter of a private corporation, it cannot compel the members to accept the charter as amended, any more than it could compel them to accept the original charter. If they do not choose to adopt the amendment, they may give up their charter altogether. The acceptance of an amendment, like the acceptance of an original charter, may be implied from the conduct of the corporation or its members, and it will be conclusively presumed if the powers conferred by the amendatory act are exercised.⁷²

The acceptance of an amendatory act, as we shall see, must generally be by the shareholders, and not by the board of directors. It must be so if it changes the constitution of the corporation. Thus, if an act of the legislature authorizes a corporation to increase its capital

⁶⁸ See, in addition to the cases cited above, *Demarest v. Flack*, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; *State v. Montgomery Light Co.*, 102 Ala. 594, 15 South. 347; *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Com. v. Cullen*, 13 Pa. 133, 53 Am. Dec. 450; *Russell v. McLellan*, 14 Pick. (Mass.) 63; *Society of Middlesex Husbandmen & Manufacturers v. Davis*, 8 Metc. (Mass.) 133; *McKay v. Beard*, 20 S. C. 156. Signing the articles of association, and complying with all the other requirements of a general law authorizing the formation of corporations, is clearly sufficient evidence of acceptance. *Glymont Imp. & Exc. Co. v. Toler*, 80 Md. 278, 30 Atl. 651; *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454.

⁶⁹ *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64, 70, 6 L. Ed. 552.

⁷⁰ *President, etc., of Lincoln & Kennebec Bank v. Richardson*, 1 Greenl. (Me.) 79, 10 Am. Dec. 84.

⁷¹ *Com. v. Cullen*, 13 Pa. 133, 53 Am. Dec. 450; post, p. 212.

⁷² *Com. v. Cullen*, supra. And see *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Owen v. Purdy*, 12 Ohio St. 73; ante, p. 46, and cases there cited in notes, 67-69. In *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765, it was held that an insurance company, by issuing policies and continuing business after an act amending the charters of such companies, passed in pursuance of a right of amendment reserved to the state in the general incorporation law, which amendment the company was therefore bound to adopt if it wished to continue business, thereby accepted the amendment.

stock, the directors cannot make the increase without the assent of the shareholders.⁷³ If, however, action by the stockholders is not required by the act itself, and the act merely grants an additional privilege which is within the scope of the general authority of the board of directors,—as, where an act authorizes a railroad company to take, for a station, land belonging to another railroad company, and the by-laws vest in the directors the power to take lands and locate stations,—it has been held that their acts alone will be sufficient evidence of acceptance.⁷⁴

PLACE OF ORGANIZATION.

25. The acceptance of the charter by the corporators, and other acts necessary to the organization of the corporation, must take place within the state.

The officers of a corporation may perform acts as agents of the corporation outside of the state of its creation, unless prohibited by local legislation; but no strictly corporate act can be done outside of the state.⁷⁵ The reason is, as we shall presently show, that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created.⁷⁶ Acceptance of a charter, and organization under it, are strictly corporate acts, and must, to be effective, take place within the state. Thus, where a charter was granted by the state of North Carolina, and the corporators, who were authorized to act as directors until others should be elected, assembled in Baltimore, and there passed resolutions of acceptance, and performed the other acts necessary to organize the corporation, it was held that the proceedings were void, and that the pretended corporation had no legal existence.⁷⁷

⁷³ *Eldman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Chicago City Ry. Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902.

⁷⁴ *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13. As to the power of directors, see post, p. 471.

⁷⁵ *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Freeman v. Mill Co.*, 38 Me. 343; *Smith v. Mining Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760. Post, p. 451.

⁷⁶ Post, p. 66.

⁷⁷ *Smith v. Mining Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760. And see *Miller v. Ewer*, 27 Me. 509, 54 Am. Rep. 760. Compare *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128. In *Glymont Imp. & Exc. Co. v. Toler*, 80 Md. 278, 30 Atl. 651, it was held that, though the directors of a corporation held their first meeting and organized outside the state, organization within the state was shown by the fact that ever since its incorporation the corporators and their successors had exercised corporate rights of every kind under the charter, had issued certificates of stock under the corporate seal,

COMPLIANCE WITH CONDITIONS PRECEDENT.

26. Where the law authorizing the formation of a corporation prescribes formalities to be observed as conditions precedent to becoming a corporation, a compliance therewith is essential to the legal existence of a corporation. But—

- (a) A substantial compliance is sufficient.**
- (b) The legal existence of a corporation is not affected by noncompliance with provisions that are merely directory, and not mandatory.**
- (c) Nor is it affected by noncompliance with conditions subsequent. This includes conditions precedent to the right to do business, which are not intended as conditions precedent to incorporation.**
- (d) A corporation de facto may exist notwithstanding noncompliance with conditions precedent; and in such a case the existence of the corporation can be questioned only by the state, and in a direct proceeding brought for that purpose.**
- (e) A person may be estopped from denying that an association is a corporation by dealing with it, or holding it out, as a corporation.**

Since it lies entirely with the state whether it will create a corporation or not, it has a right to impose any conditions it may see fit in the charter or act authorizing incorporation, and a substantial compliance therewith by the incorporators is essential to the legal existence of a corporation. In *Attorney General v. Hanchett*⁷⁸ a Michigan statute declared that whenever the common council of a city should, by resolution, declare that it was expedient to have water works constructed, but that it was inexpedient for the city to construct such works, it should be lawful for private individuals to organize a water company in the manner therein set forth. The defendants sought to organize a corporation under this statute, and assumed to act as such, without any resolution as required by the statute. In proceedings by the state, the defendants were ousted from the exercise of corporate powers on the ground that such a resolution by the common council of the city was a condition precedent to the legal existence of a corporation under the statute. And so it has been held where the statute required that there should be a certain number of associates;⁷⁹ that there should be written articles of agreement between the corpora-

had expended money in developing its property, that a board of directors had been annually elected by the stockholders within the state, and the directors so elected controlled and managed the property and affairs of the corporation.

⁷⁸ 42 Mich. 436, 4 N. W. 182.

⁷⁹ *Montgomery v. Forbes*; 148 Mass. 249, 19 N. E. 342, and 1 Cumming, Cas. Priv. Corp. 69; *State v. Critchett*, 37 Minn. 13, 32 N. W. 787. Post, p. 59.

tors;⁸⁰ that the articles of association should set forth certain facts;⁸¹ that they should be subscribed by the corporators,⁸² and acknowledged by them,⁸³ or verified;* that the articles or a certificate should be recorded or filed in a certain court or office;⁸⁴ that notice of organization, setting forth certain facts, should be published.⁸⁵

⁸⁰ *Utleigh v. Tool Co.*, 11 Gray (Mass.) 139; *Unity Ins. Co. v. Cram*, 43 N. H. 636. Where the statute requires written articles of association, "it is obvious that the three or more persons must sign and execute these articles in such a manner as to come within the well-established rules of law prescribing the elements necessary to constitute a signing or execution which will make the paper executed the legal and binding instrument of the person who executes it. Their signatures must not be procured, without fault on their part, by fraud; nor must they be affixed with the understanding and upon condition that the paper signed is not to take legal effect, and be valid and binding, either presently, or at some fixed and definite time, or upon the happening of some contingency or fulfillment of some condition within the bounds of possibility. Nor is it obvious how such an instrument as this, more than any other, can have life and binding force, if executed only to take effect upon the happening of some event, unless it is shown that the event has happened." *Corey v. Morrill*, 61 Vt. 598, 17 Atl. 840.

⁸¹ As that they should set forth the number of directors and their names. *Reed v. Railway Co.*, 50 Ind. 342; or that they should give the names and places of residence of the subscribers to stock, *Busenback v. Road Co.*, 43 Ind. 265; *Miller v. Road Co.*, 52 Ind. 51; or should state the manner of carrying on the business, *State v. Central Ohio Mut. Relief Ass'n*, 29 Ohio St. 399; or the place of carrying on the business, *Harris v. McGregor*, 29 Cal. 124; *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342, 1 Cumming, Cas. Priv. Corp. 69; *Kennett v. Woodworth-Mason Co.*, 68 N. H. 432, 39 Atl. 585; or the purposes of the incorporation, *West v. Ditching Co.*, 32 Ind. 138; *O'Reilly v. Draining Co.*, Id. 169; *Attorney General v. Lorman*, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287; *In re Crown Bank*, 44 Ch. Div. 634; or the fact that a majority of the associates were present and voted at the election of directors, *People v. Selfridge*, 52 Cal. 331.

⁸² *Kaiser v. Bank*, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; *Lawrie v. Silsby*, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 927. Articles may be signed by the corporators by their usual signatures, and the use of initials to designate their Christian names is not objectionable. *State v. Beck*, 81 Ind. 500. Signature by mark is sufficient. *Seventh Street M. E. Church*, 48 La. Ann. 1543, 21 South. 184.

⁸³ *Doyle v. Mizner*, 42 Mich. 332, 3 N. W. 968; *Kaiser v. Bank*, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; *People v. Montecito Water Co.*, 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172; *People v. Cheeseman*, 7 Colo. 376, 3 Pac. 716; *People v. Lodge*, 128 Cal. 257, 60 Pac. 865.

* *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

⁸⁴ *Abbott v. Smelting, etc., Co.*, 4 Neb. 416; *Kaiser v. Bank*, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362; *Bigelow v. Gregory*, 73 Ill. 197; *Hurt v. Salisbury*, 55 Mo. 311; *Walton v. Riley*, 85 Ky. 413, 3 S. W. 605; *Loverin v. McLaughlin*, 161 Ill. Sup. 417, 44 N. E. 99; *Gade v. Forest Glen Brick & Tile Co.*, 165 Ill. 367, 46 N. E. 286; *Bergeron v.*

⁸⁵ *Clegg v. Grange Co.*, 61 Iowa, 121, 15 N. W. 865.

Sometimes, subscriptions to stock to a certain amount are required as a condition precedent;⁸⁶ and it is sometimes required that a certain percentage of the stock subscribed shall be paid up, or shall be paid in cash.⁸⁷ In the absence of such a requirement in the statute, subscriptions to stock are not a condition precedent to corporate existence; but the corporation may be organized, and the stock, or part of it, may be subscribed afterwards.⁸⁸ Illustrations of conditions precedent might be multiplied almost indefinitely.⁸⁹

Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85; Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105; Borough of Braddock v. Penn Water Co., 189 Pa. St. 379, 42 Atl. 15; Lusk v. Riggs, 70 Neb. 713, 97 N. W. 1033; Elgin Nat. Watch Co. v. Loveland (C. C.) 132 Fed. 41. Compare Granby Mining & Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246; In re Shakopee Mfg. Co., 37 Minn. 91, 33 N. W. 219. As to filing copy with the secretary of state, see First Nat. Bank v. Davies, 43 Iowa, 424; Indianapolis F. & M. Co. v. Herkimer, 46 Ind. 142; Garnett v. Richardson, 35 Ark. 144. And compare Mokelumne Hill Canal & Mining Co. v. Woodbury, 14 Cal. 424, 78 Am. Dec. 658; Walton v. Riley, 85 Ky. 413, 3 S. W. 605. The corporation, under some statutes, comes into existence before filing the certificate, filing the certificate being required as evidence of the corporate existence, which dates from the time fixed in the certificate. See Vanneman v. Young, 52 N. J. Law, 403, 20 Atl. 53.

⁸⁶ See post, p. 299; People v. Chambers, 42 Cal. 201; Sweney v. Talcott, 85 Iowa, 103, 52 N. W. 106; Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451; Franklin Fire Ins. Co. v. Hart, 31 Md. 59. In Holman v. State, 105 Ind. 569, 5 N. E. 702, it was held that where the state, by quo warranto, directly challenged the right of persons to act as a corporation, and it appeared that many of the subscribers for the stock were notoriously insolvent, and had no expectation, at the time they subscribed, of ever paying their subscription, thus leaving the amount subscribed in good faith less than that required by the statute, a judgment of ouster was proper.

⁸⁷ People v. Chambers, 42 Cal. 201.

⁸⁸ Perkins v. Sanders, 56 Miss. 733; Hammond v. Straus, 53 Md. 1; Proprietors of City Hotel v. Dickinson, 6 Gray (Mass.) 586; Minor v. Bank, 1 Pet. 46, 7 L. Ed. 47; Johnson v. Kessler, 76 Iowa, 411, 41 N. W. 57; National Bank v. Texas Inv. Co., 74 Tex. 421, 12 S. W. 101; Singer Manuf'g Co. v. Peck, 9 S. D. 29, 67 N. W. 947. Where no provision was made in the articles for the incorporation of a creamery association or in the by-laws for issuance and payment of capital stock, and none was subscribed for, the association did not become a corporation. Byronville Creamery Ass'n v. Ivers, 93 Minn. 8, 100 N. W. 387.

⁸⁹ See Capps v. Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; Heinig v. Manufacturing Co., 81 Ky. 300. A certificate of incorporation, which provides that the corporate affairs shall be controlled by its president, vice president, and attorney, instead of providing for a board of directors, or trustees, as required by the statute, is insufficient to create a corporation de jure. Bates v. Wilson, 14 Colo. 140, 24 Pac. 99. Under an act prohibiting corporations from exercising powers until a certain bonus tax is paid, payment of the tax was held a prerequisite to corporate existence.

The fact that the articles of association include a claim of greater powers than the law allows does not render the incorporation invalid, if the excessive part of the claim can be rejected as surplusage.⁹⁰

Substantial Compliance with the Statute is Sufficient.

In organizing a corporation under either a general or a special law, only a substantial compliance with the provisions of the statute is required, even as against the state. Thus, it has been held that the organization of a corporation is sufficient where the requirements of the statute are all observed, but not in the order prescribed;⁹¹ that, where the statute requires the directors to be named in the articles of association, it is a sufficient compliance with the statute if the articles are adopted at the time of electing directors.⁹² Many other cases may be cited to the same effect.⁹³ As was said in a California case, how-

Maryland Tube & Iron Co. v. West End Imp. Co. 87 Md. 207, 39 Atl. 620, 39 L. R. A. 810. See, also, *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665; *Jones v. Hardware Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220. A corporation has no de jure existence until the secretary of state has issued the certificate required by a statute providing that, on the filing of a certified copy of the articles filed in the county clerk's office with the secretary of state, he must issue to the corporation a certificate that a copy of the articles, containing the required statement of facts, has been filed in his office, and "thereupon" the persons signing the articles, and their associates and successors shall be a body corporate. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

⁹⁰ 1 *Thomp. Corp.* § 229; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Shick v. Enterprise Co.*, 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230. *People v. Cheeseman*, 7 Colo. 376, 3 Pac. 716, under a statute incorporation for the period of 20 years, the articles of association provided for a corporate existence for 50 years. The court held that the corporation could exist for 20 years. The fact that one of the purposes of incorporation set forth in a charter is unauthorized by the statute under which the incorporation is effected does not invalidate the rest of the charter. *Tennessee Automatic Lighting Co. v. Massey* (Tenn. Ch. App.) 56 S. W. 35.

⁹¹ *Eakright v. Railroad Co.*, 13 Ind. 404.

⁹² *Eakright v. Railroad Co.*, *supra*.

⁹³ *Roman Catholic Orphan Asylum v. Abrams*, 49 Cal. 455; *People v. Stockton & V. R. Co.*, 45 Cal. 306, 313, 13 Am. Rep. 178; *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354; *Thornton v. Balcom*, 85 Iowa, 198, 52 N. W. 190; *State v. Wood*, 13 Mo. App. 139, *Id.*, 84 Mo. 378; *Buffalo & P. R. Co. v. Hatch*, 20 N. Y. 157; *Rogers v. Society*, 19 Vt. 187; *Seaton v. Grimm*, 110 Iowa, 145, 81 N. W. 225; *Carpenter v. Frazier*, 102 Tenn. 462, 52 S. W. 858; *Thomas v. Wilcox*, 18 S. D. 625, 101 N. W. 1072. Failure of the notary's certificate of acknowledgment of articles of association to show that the persons acknowledging the same were personally known to him. *People v. Cheeseman*, 7 Colo. 376, 3 Pac. 716. In *State v. Wood*, *supra*, it was held that a statutory requirement that one-half of the capital stock shall be "actually paid up in lawful money of the United States," is substantially complied with if the corporation has property the market value of which is

ever: "Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted, on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court."⁹⁴

Provisions That are Merely Directory.

It is not every provision in a charter or act of incorporation setting out formalities to be observed that is to be regarded as mandatory, so that a compliance therewith will be held a condition precedent. If the provision is merely directory, failure to comply with it will not be fatal. Whether a particular provision is mandatory or merely directory must be determined by ascertaining the intention of the legislature, to be gathered from the statute and its purpose; and in the cases on this point we must expect to find some conflicting decisions. The distinction may be illustrated by two Massachusetts cases. In *Utley v. Union Tool Co.*,⁹⁵ the alleged corporation was an association which had undertaken to assume corporate powers under a statute authorizing three or more persons, who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed by the statute, and thereby become a corporation. The court held that written articles of agreement were essential to constitute a corporation,

greater than the par value of the stock. A statement in the articles that the limit of indebtedness shall be "two-thirds of the amount of the capital stock subscribed" is a sufficient compliance with a requirement that the highest amount of indebtedness to which the corporation is at any time to subject itself must be stated. *Park v. Zwart*, 92 Iowa, 37, 60 N. W. 220.

⁹⁴ *People v. Water Co.*, 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172. In this case the statute required the articles of association, to be subscribed by five or more persons, and acknowledged by each. It was held that where five persons subscribed the articles, but only four persons acknowledged them, there was not a substantial compliance. For other cases on this point, see *Clegg v. Grange Co.*, 61 Iowa, 121, 15 N. W. 865; *People v. Golden Gate Lodge*, 128 Cal. 257, 60 Pac. 865. In *State v. Association*, 29 Ohio St. 399, it was held that a certificate of incorporation setting forth that "the manner of carrying on the business shall be such as the association shall from time to time prescribe by rules, regulations, and by-laws, not inconsistent with the laws of the state," was not a substantial compliance with a requirement that the certificate should show "the manner of carrying on the business of said association." And see *In re Crown Bank*, 44 Ch. Div. 634. Under a statute providing that a copy of the articles, verified under oath by two or more of the signers of the same, shall be recorded in the registry of deeds, the recording of the original was held not a substantial compliance. *Sclocum v. Head*, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324. The act of the secretary of state in filing and recording articles not such as required by law is a nullity. *Kinston & C. R. Co. v. Stroud*, 132 N. O. 413, 43 S. E. 913.

⁹⁵ 11 Gray (Mass.) 139. And see cases heretofore cited.

and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which, and the place in which, the corporation was established. "There is an obvious reason," it was said, "for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." On the other hand, in *Newcomb v. Reed*,⁹⁶ where an act of incorporation provided that the first meeting should be called by a majority of the persons named in the act of incorporation, it was held that this provision was merely directory, and a failure to comply therewith did not prevent the corporation from coming into existence.⁹⁷

Present Grant with Conditions Subsequent—Conditions Precedent to Doing Business.

Acts authorizing the formation of a corporation, and prescribing conditions precedent to its coming into existence, must be distinguished from acts creating a corporation, and giving it a present corporate existence, but prescribing conditions to be subsequently complied with. In the latter case, acceptance of the grant is all that is necessary to the creation of a corporation. Noncompliance with a condition subsequent does not affect the existence of the corporation, though it may be ground for a proceeding by the state to forfeit the charter. An act of the legislature of Missouri, incorporating a railroad company, declared that "a company is hereby created, called the 'St. Joseph & Iowa Railroad Company,'" and designated the first board of directors, but imposed no conditions precedent. It did provide, however, that the directors should meet and organize as a board of directors, and open books for subscriptions to stock, and fixed a time within which the company should commence and complete its road. It was held that these were merely conditions subsequent; that the act was a present grant of corporate powers; and that the corporation came into existence on acceptance of the charter.⁹⁸

⁹⁶ 12 Allen (Mass.) 362, 1 Cumming, Cas. Priv. Corp. 67.

⁹⁷ See, also, *Walworth v. Brackett*, 98 Mass. 98; *Cross v. Mill Co.*, 17 Ill. 54; *Proprietors of City Hotel in Worcester v. Dickinson*, 6 Gray (Mass.) 586, 593; *Eakright v. Railroad Co.*, 13 Ind. 404; *Humphreys v. Mooney*, 5 Colo. 282; *Braintree Water-Supply Co. v. Town of Braintree*, 146 Mass. 482, 16 N. E. 420.

⁹⁸ *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 582. See, also, *Cheraw & C. R. Co. v. White*, 14 S. C. 51; *Toledo & Ann Arbor R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492. For other illustrations of conditions

Conditions precedent to the formation of a corporation must be distinguished from conditions precedent to the right to engage in business after the corporation has been formed. The latter are conditions subsequent, a noncompliance with which, while it may give the state a right to maintain proceedings to forfeit the charter, does not, in the absence of such proceedings, in any way affect the legal existence of the corporation. The case of *Harrod v. Hammer*⁹⁹ illustrates this distinction. A statute of Wisconsin provided that, before any corporation organized thereunder should "commence business," the officers should cause the articles of association to be published in the papers, make a certificate setting forth the purpose for which the corporation was formed and certain other facts, and deposit the same with certain public officers. It was held that a failure to comply with these conditions did not affect the legal existence of the corporation.¹⁰⁰ "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter."¹⁰¹

Who may Object—Corporation de Facto—Estoppel.

While conditions precedent must always be performed, in order that a corporation may have a legal existence, it does not follow that objection to the existence of a corporation on this ground can be raised by any and every person, and in every proceeding. The

subsequent, see *Boston Acid Manuf'g Co. v. Moring*, 15 Gray (Mass.) 211; *Schenectady & Saratoga Plank-Road Co. v. Thatcher*, 11 N. Y. 102; *Merrick v. Governor Co.*, 101 Mass. 381.

⁹⁹ 32 Wis. 162.

¹⁰⁰ See, also, *In re Shakopee Manuf'g Co.*, 37 Minn. 91, 33 N. W. 219; *Baker v. Backus' Adm'r*, 32 Ill. 79; *Lord v. Association*, 37 Md. 320; *Hammond v. Straus*, 53 Md. 1, 11; *Holmes v. Gilliland*, 41 Barb. (N. Y.) 568; *Hughesdale Manuf'g Co. v. Vanner*, 12 R. I. 491; *Granby Mining & Smelting Co. v. Richards*, 95 Mo. 106, 8 S. W. 246; *Sparks v. Steel Co.*, 87 Ala. 294, 6 South. 195; *Portland & G. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. 794. But see *Bigelow v. Gregory*, 73 Ill. 197; *Hurt v. Salisbury*, 55 Mo. 311; *Elsfeld v. Kenworth*, 50 Iowa, 389.

¹⁰¹ *Mokelumne Hill Canal Min. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658; *Hyde v. Doe*, 4 Sawy. 133, Fed. Cas. No. 6,969; *State v. Twin Village Water Co.*, 98 Me. 214, 56 Atl. 763.

objection may always be raised by the state in a direct proceeding brought by it to test the right to corporate existence, as in quo warranto proceedings, or proceedings in the nature of quo warranto.¹⁰² Even the state, however, cannot always raise the objection; and there are many cases in which private individuals cannot object at all, though in a direct proceeding by the state it might be held that there was no legal incorporation.

We shall presently see, that if there has been a bona fide attempt to incorporate, under a law authorizing incorporation, and the law has been so far complied with as to make the association what is called a "corporation de facto," the only way in which its corporate existence can be questioned is in a direct proceeding by the state, brought for that purpose. Private individuals cannot raise the objection in such a case, either directly or indirectly, and even the state cannot raise the objection collaterally. If failure to comply with conditions precedent prevents the coming into existence of any corporation either de jure or de facto, then, on principle and in reason, the question may be raised collaterally as well as directly, and by private individuals as well as by the state, unless there is something to operate as an estoppel. When a private individual, therefore, raises the objection that conditions precedent have not been complied with, the question, in the absence of elements of estoppel, is whether or not there is a corporation de facto. If there is, he cannot object; otherwise, he can.

Where there is not even a corporation de facto, a private person may, by the weight of authority, be barred from raising the objection on the ground that he is estopped by his conduct, as by having dealt with the pretended corporation as a corporation, or by having held it out to the public as a legally constituted corporation.

There is much confusion, and some direct conflict, in the decisions, on the law governing corporations de facto, and on the question of estoppel. These questions will be discussed and explained at length in a subsequent chapter.¹⁰³

¹⁰² Attorney General v. Hanchett, 42 Mich. 436, 4 N. W. 182; People v. Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172; State v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399; People v. Selfridge, 52 Cal. 331; People v. Chambers, 42 Cal. 201.

¹⁰³ Post p. 78.

AGREEMENT BETWEEN CORPORATORS AND CORPORATION.

27. An agreement between the corporators and the corporation, creating a contractual relation between them, is essential to the creation of a private corporation.

It is essential to the existence of a private corporation that there shall be an agreement between the corporators and the corporation, creating a contractual relation between them. There can be no such thing as a corporation aggregate without members, and a person cannot become a member except by his own agreement or contract. Some writers and some of the cases say that there must be an agreement between the members, creating a contractual relation between them,¹⁰⁴ but this is inaccurate. There is no contract between individual members in the formation of a corporation. The contract is between each individual member and the whole body of members in their collective capacity, represented by the corporation; that is, between each member and the corporation. A subscription for shares, for instance, in the organization of a corporation, is not a contract between the subscriber and the other subscribers individually, but it is a contract between each subscriber and the corporate body. This subject will be explained at length in a subsequent chapter.¹⁰⁵

WHO MAY BECOME CORPORATORS.

28. Unless excluded by the statute, any person who has the capacity to enter into contracts may be a corporator.

29. If a statute provides that a certain number of persons may organize a corporation, the prescribed number of bona fide corporators is necessary.

Capacity of the Corporators.

It is an implied term in every statute authorizing the formation of corporations, and not expressly providing otherwise, that the corporators shall be persons who are sui juris, and competent to enter into a valid contract, though the statute may in terms say nothing at all about their capacity.¹⁰⁶ Thus, it is implied that the corporators shall be of full age.¹⁰⁷

¹⁰⁴ 1 Mor. Priv. Corp. § 24. And see *Lauman v. Railroad Co.*, 30 Pa. 42, 72 Am. Dec. 685; *Green v. Knife Falls Boom Corp.*, 35 Minn. 155, 27 N. W. 924.

¹⁰⁵ Post, p. 251.

¹⁰⁶ In re *Globe Mut. Ben. Ass'n*, 63 Hun, 263, 17 N. Y. Supp. 852.

¹⁰⁷ Id.

Corporations are composed generally of natural persons in their natural capacity; but they may be composed of persons in their political and artificial capacity, as other corporations. In the time of Edward the Sixth, a hospital corporation was established and chartered in England, composed of the mayor, citizens, and commonalty of London; and the same is true of a number of colleges, universities, and hospitals, both in England and in this country.¹⁰⁸ The universities of Oxford and Cambridge are corporations composed of many colleges which are separate and distinct corporations. In some jurisdictions one business corporation is allowed to take shares in another.¹⁰⁹ It has been very generally held in this country, however, that, in the absence of express provision to that effect in the statute, a private business corporation cannot become a member of another corporation by subscribing for shares, as it is considered that public policy restricts the right to form a corporation to persons acting individually and in their natural capacity.¹¹⁰ And it has been held that this rule is not affected by the fact that the statute allows "persons" to incorporate; and there is another statute declaring that the term "person" may be construed to include corporations as well as individuals, as this does not require such a construction in all cases.¹¹¹

Unless the statute expressly requires that the individuals organizing a corporation shall be residents of the state, a corporation may be formed by nonresidents, and, in so far as that state is concerned, it can make no difference that the place of business of the corporation is to be in the state of the corporators' residence.¹¹² Whether or not the corporation will be recognized as valid by the latter state is a different question, and depends upon whether such an incorporation was an evasion of, and a fraud upon, its laws.¹¹³ In most states a certain number of the corporators are required to be residents.

Number of Corporators.

Generally, the statutes authorizing the formation of corporations require expressly that there shall be at least a certain number of corporators, and such a requirement must be complied with. If less than

¹⁰⁸ *Regents of University of Maryland v. Williams*, 9 Gill & J. (Md.) 365, 393, 31 Am. Dec. 72.

¹⁰⁹ Post, p. 145.

¹¹⁰ Post, p. 145. See *Denny Hotel Co. of Seattle v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

¹¹¹ *Denny Hotel Co. of Seattle v. Schram*, supra.

¹¹² *Demarest v. Flack*, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; *Lancaster v. Improvement Co.*, 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322.

¹¹³ *Demarest v. Flack*, supra.

the required number of persons attempt to organize under the statute, no corporation will come into existence.¹¹⁴

It is perhaps safe to say that there is in no state a statute authorizing a single individual to form himself into a corporate body, and thus change his status and liabilities in business transactions. It must not be supposed, however, that the state has no power to constitute a single person a private corporation. The state may, if the legislature sees fit, and there are no constitutional restrictions, grant a charter, as a private business corporation, to one man alone, and leave it optional with him whether he will associate other persons with him, or have succession without doing so. In such a case it was said: "The grant being to one person, * * * the inference necessarily is that it was the intention of the legislature to permit that one person or his successor to exercise all the corporate powers, and to make his acts, when acting upon the subject-matter of the corporation, and within its sphere of action and grant of power, the acts of the corporation."¹¹⁵ A statute is not to be construed as authorizing a single individual to form and become a corporation, unless such an intention on the part of the legislature is clear. Thus, one person alone cannot organize a corporation under a statute authorizing "any number of persons" to associate themselves and become incorporated; for it is against the policy and intent of the law to permit a single individual to conduct his business in the name of and as a corporation, so as to exempt himself from the liabilities of other natural persons.¹¹⁷ Where a corporation is legally organized by the requisite number of persons, the fact that one person becomes the owner of all the shares does not dissolve it.¹¹⁸

¹¹⁴ *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342, 1 Cumming, Cas. Priv. Corp. 69; *State v. Critchett*, 37 Minn. 13, 32 N. W. 787. In the absence of fraud, the objection cannot be raised that six of the seven required stockholders are "straw" men, having no real interest. *Salomon v. Salomon & Co.*, 13 The Times L. R. 46, reversing *Broderip v. Salomon*, L. R. 2 Ch. 323, 72 L. T. Rep. 755. Ante, p. 49.

¹¹⁵ *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656. And see *Day v. Stetson*, '8 Greenl. (Me.) 365.

¹¹⁷ *Louisville Banking Co. v. Elsenman*, 94 Ky. 83, 21 S. W. 531, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335; *Swift v. Smith*, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336.

¹¹⁸ Post, p. 233.

PURPOSE OF INCORPORATION.

30. Since legislative authority is essential to a valid incorporation the purpose for which a corporation is formed must come within the purposes authorized by the statute.

Since there can be no valid incorporation without legislative authority, it follows that the object of a proposed corporation must be such as the statute authorizes. It is not a question whether the object is lawful or unlawful, but whether it is authorized.¹¹⁹

The difficulty in this connection, and the only difficulty, is in determining, on a construction of the statute, whether the purpose of particular associations, as set forth in the articles of association or certificate, is within the statute. Some cases are very clear. Thus, there can be no doubt but that a statute authorizing corporations for manufacturing purposes does not authorize a corporation for banking, or for constructing and operating a railroad. Sometimes, however, the construction of the statute and application of the rule is difficult. A statute authorizing the formation of corporations "for buying, selling, exchanging and dealing in all kinds of property, real or personal, or both," is very broad. Perhaps it might be held to authorize a manufacturing or banking corporation; but it does not authorize a corporation "to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly installments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accumulations; and to carry on and conduct a general investment business,"—for the primary object of such an association is to obtain money from its members, and the disposal of the money obtained by it is merely an incidental or secondary object.¹²⁰ Nor, for the same reason, is such a corporation authorized by a statute providing for the formation of corporations "for loaning money on securities or otherwise," or "for the maintenance of any benevolent or charitable institution."¹²¹ Other decisions are given below.¹²²

¹¹⁹ *State v. International Inv. Co.*, 88 Wis. 512, 60 N. W. 796, 43 Am. St. Rep. 920; *People v. Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 54 N. E. 407, 72 Am. St. Rep. 326; *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 54 Atl. 570.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² A corporation to build and maintain an opera house and lecture hall is authorized by a statute allowing incorporation for the support of any educational or literary undertaking, or for the promotion of music or other fine arts. *Seymour Opera-House Co. v. Wooldridge* (Tex. Civ. App.) 31 S. W. 234. A statute allowing corporations to carry on an "industrial pursuit" authorizes

Where the object of an attempted incorporation cannot be brought within any of the purposes specifically mentioned in the statute, it is often sought to sustain the incorporation under a general clause contained in the statutes of most states. The construction of such clauses has given rise to conflicting decisions. In Wisconsin, a statute, after specifying certain purposes for which corporations might be formed, added the general clause, "or for any lawful business or purpose whatever." The Wisconsin court, construing this clause, held that, "by a well-settled rule of construction, these general words extend only to things of a kindred nature to those specifically au-

corporations to carry on the express business, *Wells, Fargo & Co. v. Northern Pac. R. Co.* (C. C.) 23 Fed. 469; or a mercantile business for the sale of goods, *Agua Fria Copper Co. v. Bashford-Burmister Co.*, 4 Ariz. 203, 35 Pac. 983; *Carver Mercantile Co. v. Hulme*, 7 Mont. 566, 19 Pac. 213. Under a statute allowing corporations for any lawful enterprise, business, pursuit, or occupation, a corporation may be formed to guaranty the bonds of a university. *Maxwell v. Akin* (C. C.) 89 Fed. 178. A statute authorizing "manufacturing" companies includes electric light and gas companies. *Beggs v. Illuminating Co.*, 96 Ala. 295, 11 South. 381, 38 Am. St. Rep. 94; *Nassau Gaslight Co. v. City of Brooklyn*, 89 N. Y. 409; *People v. Wemple*, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708. But see *Com. v. Northern Electric Light & Power Co.*, 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107. "Manufacturing" includes the production of ice by artificial means, but it has been held that it does not include the collection, storage, preparation for market, and transportation of naturally formed ice. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669. Contra, *Attorney General v. Lorman*, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287. It also includes the manufacture of lumber, flour, and meal. *Cross v. Mill Co.*, 17 Ill. 54. A statute authorizing corporations for "manufacturing" purposes does not authorize a corporation for the purpose of carrying on a manufacturing business, and also another and independent business not properly incident to or connected with manufacturing. *State v. Minnesota Thresher Manuf'g Co.*, 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510. A statute authorizing corporations "for the erection of buildings" was held to authorize corporations for erecting buildings as a business only. *People v. Troy House Co.*, 44 Barb. (N. Y.) 625. In *Guadalupe & S. A. R. Stock Ass'n v. West*, 70 Tex. 391, 7 S. W. 817, it was held that a corporation organized to protect the personal property of its members from violence, theft, etc., to raise money for necessary expenses by assessments, and confer with the state officers, employ counsel, police, and detectives, when necessary to the prosecution of criminals, though somewhat novel and peculiar, was authorized by a statute providing that private corporations might be formed for mutual profit or benefit, not inconsistent with the constitution and laws of the state. That an educational institution is not a corporation "for pecuniary profit," though fees are charged for tuition, see *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776. A "mutual reliance society," constituted for pecuniary gain cannot be formed under an act for the incorporation of benevolent, charitable, scientific, and missionary societies. *People v. Nelson*, 46 N. Y. 477. As to the purposes for which corporations may be formed, see, generally, 10 Cyc. pp. 160-165.

thorized by the section. 'Noscitur a sociis.' Any other construction would enable parties, by mere agreement, to form a corporation for any conceivable 'business or purpose whatever,' not in violation of law. Certainly, the legislature never intended to grant such unlimited authority."¹²³ This construction is certainly very questionable.

A better decision was made by the Missouri court in construing a general clause which authorized the formation of corporations "for any other purpose intended for pecuniary profit or gain not otherwise specially provided for, and not inconsistent with the constitution and laws of this state." It was held that this authorized a corporation as the words of the clause imported, and should not be construed and limited to corporations of the kind specially mentioned in the preceding clauses.¹²⁴ And it has been held that a statute authorizing corporations "for mining, manufacturing, and other industrial pursuits" did not limit the purpose to such industrial pursuits as mining and manufacturing, but extended to the express business, or any other industrial pursuit.¹²⁵ There are many other cases in which the statute has been similarly construed.¹²⁶ The question in all cases is what was the intention of the legislature, and not what, in the opinion of the court, the legislature ought to have intended.

Formation for Unlawful Purposes.

The formation of a corporation is not permitted where the real purpose of the corporation is to cloak an illegal object or an unlawful business; and in such case the fiction of the existence of the corporation as a legal entity will be disregarded, and the acts of the real parties dealt with as if no corporation had been formed.*

A corporation formed by the various manufacturers and sellers of a product, for the purpose of getting control of the manufacture and sale of the product, so as to stifle competition, and control the supply and price, is illegal, as being contrary to public policy, because it creates a monopoly, and is in restraint of trade. In *Distilling &*

¹²³ *State v. International Inv. Co.*, 88 Wis. 512, 60 N. W. 798, 43 Am. St. Rep. 920. Even under this construction, it is held that a statute authorizing the formation of corporations for the purpose of building and operating telegraph lines, or for any other lawful business, etc., authorizes a corporation for building and operating a telephone line, as that is of a kindred nature. *Wisconsin Tel. Co. v. City of Oshkosh*, 62 Wis. 32, 21 N. W. 828.

¹²⁴ *State v. Corkins*, 123 Mo. 56, 27 S. W. 363.

¹²⁵ *Wells, Fargo & Co. v. Northern Pac. R. Co.* (C. C.) 23 Fed. 469, 474.

¹²⁶ *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440; *National Bank v. Texas Inv. Co.*, 74 Tex. 421, 12 S. W. 101; *Brown v. Corbin*, 40 Minn. 508, 42 N. W. 481; *Vokes v. Eaton*, 85 S. W. 174, 27 Ky. Law Rep. 358.

* *First Nat. Bank v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834. And see *United States v. Northern Securities Co.* (C. C.) 120 Fed. 721. See 10 Cyc. 161.

Cattle Feeding Co. v. People,¹²⁷ in which quo warranto proceedings were brought against the defendant corporation to oust it from the exercise of corporate franchises, it appeared that a trust combination was organized in order to obtain control of the manufacture and sale of distillery products, by purchasing the stock of various distillery companies, and placing it in the hands of trustees. The trust combination was then changed into the defendant corporation, which was organized, owned, and controlled by the trustees of the combination, and all the property controlled by the combination was transferred to it. The corporation was held illegal, as creating a monopoly, and was ousted from the exercise of corporate franchises.¹²⁸

CORPORATE NAME.

32. A corporation must have a corporate name.

33. Ordinarily the corporators may select any name they choose.
But—

(a) Sometimes there are statutory restrictions in this respect, and the statute must be complied with.

(b) By the common law, and by statute in some states, a corporation may not adopt the same, or substantially the same, name as that of another corporation chartered by the same state.

34. A corporation may acquire a name by user or reputation and it may thus be known by several names.

35. When a name has been given to a corporation in its creation, it cannot be changed without legislative authority.

As was stated in explaining the attributes of a corporate body, it is essential to the existence of such a body that it shall have some name by which it may be known and have succession, and under which it can contract and sue and be sued.¹²⁹

¹²⁷ 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200.

¹²⁸ See, also, *People v. North River Sugar-Refining Co.*, 121 N. Y. 587, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *People v. Milk Exchange*, 145 N. Y. 269, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577. Post, p. 268.

¹²⁹ Ante, p. 15. "The names of corporations are given of necessity, for the name is, as it were, the very being of the constitution; for, though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it

Ordinarily, in organizing a corporation, the incorporators may select any name they choose for the body, but in some states the choice is to some extent limited by statute. In Connecticut it was, and is perhaps still, required by statute that the name of every corporation organized under the general laws shall commence with the word, "The," and end with the word, "Company" or "Corporation"; and there are similar provisions in some of the other states.

Name of Another Corporation.

In some states it is expressly provided by statute that no corporation shall adopt the same name that is being used at the time by another corporation.¹⁸⁰ This, or a similar provision, it has been held, prevents the selection of a name that is substantially, though not exactly, the same as that of another corporation.¹⁸¹

At common law, and independently of any statute, a corporation has an exclusive right to the use of its name, and it will be protected by a court of equity, by injunction, against its use by another corporation. "The name of a corporation is a necessary element of its existence, and, aside from any statute, the right to its exclusive use will be protected upon the same principles that persons are protected in the use of trade-marks."¹⁸²

Acquisition by User and Reputation.

Generally, a name is given to a corporation when it is created, whether by a special law or under a general law. If this is not done,

is nobody to plead and be impleaded to take and give, until it hath gotten a name." 2 Bac. Abr. tit. "Corporations," c. 1. "The identity of name is the principal means for effecting that perpetuity of succession, with members frequently changing, which is an important purpose of incorporation." Reg. v. Registrar, 10 Q. B. 839.

¹⁸⁰ See *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, 40 N. E. 616; *State v. McGrath*, 92 Mo. 355, 5 S. W. 29; *Illinois Watch Case Co. v. Pearson*, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429.

¹⁸¹ Thus, it was held that, where there was a corporation by the name of "Kansas City Real-Estate and Stock-Exchange," the secretary of state would not be compelled by a writ of mandamus to issue a certificate of incorporation to the "Kansas City Real-Estate Exchange." *State v. McGrath*, supra. The supreme court of Illinois, however, held that such a statute did not prevent the incorporation of the "Elgin Butter Company" and the "Elgin Creamery Company." *Elgin Butter Co. v. Elgin Creamery Co.*, supra.

¹⁸² *State v. McGrath*, 92 Mo. 355, 5 S. W. 29; *Newby v. Railway Co.*, Deady, 609, Fed. Cas. No. 10,144; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manuf'g Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Rogers Co. v. Wm. Rogers Manuf'g Co.*, 17 C. C. A. 579, 70 Fed. 1017; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *Red Polled Cattle Club v. Red Polled Cattle Club*, 108 Iowa, 105, 78 N. W. 803. See 10 Cyc. 151.

however, it may, in the absence of statutory regulations, acquire a name by user or by reputation;¹⁸³ and it has been held that it may thus be known by several names.¹⁸⁴

Change of Name.

Where a name has been given to a corporation in its creation, it cannot, unless authorized by statute, change its name, either directly, as by resolution, or indirectly, by the use of another.¹⁸⁵ Such a change must be made, if at all, under legislative authority, and the statute must be complied with.¹⁸⁶ Any act which provides that an existing corporation shall or may change its name, changes, in an essential particular, the organic law of such corporation, and is therefore an amendment of its charter, and subject to all the rules relating to amendments.¹⁸⁷ A change of its name does not change the identity of the corporation, or affect its liability previously created or its title to property.¹⁸⁸ It is not in any sense the creation of a new corporation, and therefore the change may be authorized by a special act without violating the constitutional provision that corporations shall be created only under general laws.¹⁸⁹

Effect of Misnomer

Misnomer of a corporation in a bond, note, or other deed or contract, does not vitiate it; but the corporation may sue or be sued thereon in its true name, with an allegation and proof that it is the party intended. Nor will a grant to or by a corporation be avoided because of a misnomer. And a devise or legacy to a corporation is good if the corporation is so described that it can be identified. In

¹⁸³ *Dutch West India Co. v. Van Moses*, 1 Strange, 612; *Anon.*, 3 Salk. 102; *Smith v. Plank-Road Co.*, 30 Ala. 650; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Sykes v. People*, 132 Ill. 82, 23 N. E. 391.

¹⁸⁴ *Anon.*, 3 Salk. 102; *Minot v. Curtis*, 7 Mass. 441; *Society for Propagating the Gospel v. Young*, 2 N. H. 810; *Ferry v. Cincinnati Underwriters*, 111 Mich. 261, 69 N. W. 483.

¹⁸⁵ *Sykes v. People*, 132 Ill. 82, 23 N. E. 391; *Reg. v. Registrar*, 10 Q. B. 839. Cf. *Richards v. Minnesota Savings Bank*, 75 Minn. 196, 77 N. W. 822.

¹⁸⁶ In New York the court is authorized to grant a corporation an order to change its name where it appears "that there is no reasonable objection." This leaves the question whether a change shall be allowed within the discretion of the court. In *re United States Mercantile Reporting & Collecting Agency*, 115 N. Y. 176, 21 N. E. 1034.

¹⁸⁷ *Sykes v. People*, 132 Ill. 82, 23 N. E. 391.

¹⁸⁸ *Girard v. Philadelphia*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *South Carolina Mut. Ins. Co. v. Price*, 67 S. C. 207, 45 S. E. 173; *Wilhite v. Convent of Good Shepherd*, 78 S. W. 138, 25 Ky. Law Rep. 1375.

¹⁸⁹ *Ante*, p. 89.

all of these cases parol evidence is admissible to explain the ambiguity and identify the corporation.¹⁴⁰

In legal proceedings, corporations must be correctly named. In a suit against a corporation, a misnomer not in substance is ground for plea in abatement; but if the corporation appears, and does not plead in abatement, it cannot afterwards object. If the misnomer is substantial, the proceedings will not affect the corporation. The same is true of criminal prosecutions against corporations. Misnomer is fatal to writs of execution, mandamus, etc., against a corporation. It is also fatal to a judgment against a corporation.¹⁴¹

RESIDENCE AND CITIZENSHIP OF CORPORATIONS.

- 36. A corporation has no legal existence beyond the boundaries of the state by which it was created. In so far as it can be a citizen, resident, or inhabitant, it is a citizen, resident, or inhabitant of that state, and of that state only, though it may do business in another.**
- 37. Where corporations are formed by corresponding legislation in different states,—as where corporations of different states are consolidated under similar acts in each state, or where one state makes a corporation of another state, as there conducted, a corporation of its own,—the legal effect is that there is a separate corporation in each state.**
- 38. An act merely recognizing a foreign corporation, and allowing it to do business in the state, is a mere license, and not a charter, and does not change the character of the body as a foreign corporation.**

A corporation, as we have seen, has an individuality separate from that of the members who compose it. It acts and is regarded, for many purposes, as a distinct person, having many of the rights, and being subject to many of the liabilities, of natural persons. It is important, therefore, to determine the residence or citizenship of corporations. The question has generally arisen in connection with

¹⁴⁰ *Hager's-Town Turnpike Road Co. v. Creeger*, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495; *President, etc., of Berks & Dauphin Turnpike Road v. Myers*, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402; *Mount Palatine Academy v. Kleinschnitz*, 28 Ill. 133; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *New York Institution for the Blind v. How's Ex'rs*, 10 N. Y. 84; *Society for Propagating the Gospel v. Young*, 2 N. H. 310; 1 *Thomp. Corp.* §§ 294, 295.

¹⁴¹ As sustaining these propositions, see *McGary v. People*, 45 N. Y. 155; *Glass v. Turnpike Co.*, 32 Ind. 876; *Woodrough & Hanchett Co. v. Witte*, 89 Wis. 537, 62 N. W. 518; *Precious Blood Soc. v. Elsythe*, 102 Tenn. 40, 50 S. W. 759; 1 *Thomp. Corp.* §§ 290-293.

the question of jurisdiction of suits by and against corporations in the federal courts, but it may arise in many other ways.

Domicile—Residence—Habitat.

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created."¹⁴³ It may therefore be stated as a rule that a corporation has its domicile in the state which created it, and that it cannot acquire a domicile in another state, although it may have an office and do business there.¹⁴³

And for the same reason a corporation cannot be a resident of another state than that in which it was incorporated. Such is the uniform construction of statutes in which the term "resident" or "nonresident" is used, where the question is presented whether a foreign corporation is included in the term.¹⁴⁴ A foreign corporation doing business in a

¹⁴³ "In *Bank v. Earle*, 13 Pet. (U. S.) 519, 588, 10 L. Ed. 274, Chief Justice Taney said: 'It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting to another.' This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it." *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, per Gray, J. Post, p. 602. In England, the theory that a corporation cannot exist outside the state of its creation seems no longer to be held. A foreign corporation, doing business in England, it seems, may be sued without its consent. *Newby v. Van Oppen*, L. R. 7 Q. B. 293; *La Bourgogne* (1899) A. C. 431. And it is a person residing in the kingdom within the meaning of the income tax act. *De Beers, etc., Mines, Ltd., v. Howe* (1906) A. C. 455.

¹⁴³ *Insurance Co. v. Francis*, 11 Wall. (U. S.) 210, 20 L. Ed. 77; *Olson v. Buffalo Hump. Min. Co.* (C. C.) 130 Fed. 1017; *Chafee v. Fourth Nat. Bank*, 71 Me. 514, 36 Am. Rep. 345; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 688; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Aspinwall v. Ohio & M. Ry. Co.*, 20 Ind. 492, 83 Am. Dec. 329; *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; *Boston Investment Co. v. Boston*, 158 Mass. 461, 83 N. E. 580; *Bergner v. Engel Brewing Co.*, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251; *Ireland v. Milling & Reduction Co.*, 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756; *People v. Home Life Assur. Co.*, 111 Mich. 405, 69 N. W. 653.

¹⁴⁴ *Stafford v. American Mills Co.*, 13 R. I. 310; *Hammond Beef & P. Co. v. Best*, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528; *People v. Barker*, 141 N. Y. 118, 35 N. E. 1073, 23 L. R. A. 95; *Shepard & Morse Lumber Co. v. Burlleigh*,

state through an agent, however, may be subject to the jurisdiction for purposes of process and suit, if the law makes provision for the service of process;¹⁴⁵ and for this purpose a foreign corporation is declared to be "found"¹⁴⁶ in or to be a resident¹⁴⁷ of a state in which it does business.

So, under the act of Congress requiring suits in the federal courts, with certain exceptions, to be brought in the district whereof the defendant is an inhabitant, a corporation, for the purpose of suits against it in the federal courts, is an inhabitant of the state of its creation, and of that state only, though it may be doing business in other states, and may have an agent there, and may have submitted, in the other states, to the jurisdiction of their courts.¹⁴⁸

Citizenship.

Strictly speaking, a corporation is not a citizen within the federal constitution.¹⁴⁹ For the purpose of determining the jurisdiction of the federal courts of suits by and against corporations, however, a corporation "is to be regarded as if it were a citizen of the state where it was created."¹⁵⁰ This result is reached by means of a legal fiction.

27 App. Div. 99, 50 N. Y. Supp. 135; *Boyer v. Northern P. Ry. Co.*, 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691; *Keystone Driller Co. v. Superior Court*, 138 Cal. 738, 72 Pac. 398.

¹⁴⁵ Post, p. 625.

¹⁴⁶ *Blackburn v. Selma M. & M. R. Co.*, 2 Flap. 525, Fed. Cas. No. 1,467; *Hayden v. Androscoggin Mills (C. C.)* 1 Fed. 93.

¹⁴⁷ *Williams v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 519, 16 S. E. 303.

¹⁴⁸ Post, pp. 602, 634.

¹⁴⁹ Post, p. 605.

¹⁵⁰ *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. Ed. 354, 1 Cumming, Cas. Priv. Corp. 46; *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 297, 17 L. Ed. 130; *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497, 11 L. Ed. 353; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, 2 Cumming, Cas. Priv. Corp. 5, W. D. Smith, Cas. Corp. 15, Shep. Cas. Corp. 55; note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174, 56 Fed. 951; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Hammond Beef & P. Co. v. Best*, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528. See *Bank of U. S. v. Deveaux*, 5 Cranch (U. S.) 61, 3 L. Ed. 38; *Marshall v. Railroad Co.*, 16 How. (U. S.) 314, 327, 14 L. Ed. 953. For this reason it must appear somewhere (anywhere) in the pleadings, in an action against a corporation in a federal court, in what state it was created, if the only ground for federal jurisdiction is diverse citizenship. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *St. Louis, I. M. & S. Ry. Co. v. Newcom*, supra. An averment that a defendant corporation is a citizen of a certain state other than that in which suit is brought is not a sufficient allegation of diverse citizenship. The pleading must show that it was created by the laws of a foreign state. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451. The citizenship of a corporation, for the purposes of jurisdiction of a suit by or against it in the federal courts, is to be determined as of the time

"In such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that the stockholders are citizens of the state which, by its laws, created the corporation."¹⁵¹

Charters from Several States.

It has been said that it is competent for several states to unite in creating the same corporation, or in consolidating several pre-existing corporations into a single one; but this is very inaccurate language. Several states may, by corresponding legislation, create several corporations, one in each state, having the same name, and the same object and powers, and being under the same management; but in the nature of things they cannot unite in creating the same corporation, for the laws of a state can have no extraterritorial effect. Suppose, for instance, it is desired to incorporate a railroad company to construct and operate, under one management, a railroad through several states. In the absence of constitutional limitations, it is competent for the legislatures of these states to pass similar laws, chartering corporations to construct and operate the road, and to have the same name and the same powers in each state, and to be under one management, with principal offices in one state. So, where different corporations have been created by different states, it is competent for the legislatures of the different states to pass corresponding laws for the purpose of giving them the same name and putting them under one management, or, in popular understanding, of consolidating them. And where a corporation has been created by one state, it is competent for another state, by appropriate legislation, to make that corporation, as chartered and conducted in the first-named state, a corporation of its own.¹⁵²

when the suit was commenced, and not as of the time when the cause of action accrued. *Stout v. Railroad Co.* (C. O.) 8 Fed. 794, *Cumming, Cas. Priv. Corp.* 61.

¹⁵¹ *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

¹⁵² "It is entirely competent for the state, by its legislation, to determine the mode of creating corporations within its limits; and if it sees fit to declare that a foreign corporation may become a corporation of the state by building a railroad therein, and filing a copy of its articles of incorporation with the secretary of state, I have no doubt that compliance with these terms constitutes the foreign corporation a domestic corporation with respect to all its transactions within such state." *Stout v. Railroad Co.* (C. C.) 8 Fed. 794, 1 *Cumming, Cas. Priv. Corp.* 61. And see *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Grat. (Va.) 655, 65 Am. Dec. 254; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433, 22 C. C. A. 378; *Winn v. Wabash R. Co.* (C. C.) 118 Fed. 55; *Alabama & G. Mfg. Co. v. Riverdale Cotton Mills*, 127 Fed. 497, 62 C. C. A. 295; *Bernhardt v. Brown*, 119 N. C. 506, 26 S. E. 162, 36 L. R. A. 402. Yet, in the case of a corporation created by one state and after-

In none of these cases, however, do the different states unite in creating the same corporation, or in consolidating the several corporations into a single one. The result of such legislation is to create a separate and distinct corporation in each state. The corporations may have the same name in each state, it is true, and they may have the same powers, and be under one management, so that for all practical purposes they are conducted as a single corporation; but in law they are separate and distinct corporate bodies. The reason is that it is not possible for a state to pass a law which will have effect in another state, and a law of one state, therefore, cannot create, nor aid in creating, a corporation in another state.¹⁵³

wards rechartered in another, it is anomalously held that it does not thereby become a citizen of the state in which it is rechartered, so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship. *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 17 Sup. Ct. 925, 42 L. Ed. 315; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Southern Ry. Co. v. Allison*, 180 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078 (overruling *Allison v. Southern Ry. Co.*, 129 N. C. 336, 40 S. E. 91;) *Hollingsworth v. Southern Ry. Co.* (C. C.) 86 Fed. 353; *Wilson v. Southern Ry. Co.*, 64 S. C. 162, 41 S. E. 971.

¹⁵³ *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 286, 17 L. Ed. 130; *Missouri Pac. Ry. Co. v. Meeh*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; *Railway Co. v. Whitton's Adm'r*, 13 Wall. (U. S.) 270, 20 L. Ed. 571; *Newport & C. Bridge Co. v. Woolley*, 78 Ky. 523; *Fitzgerald v. Missouri Pac. Ry. Co.* (C. C.) 45 Fed. 812; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207, 1 Cumming. Cas. Priv. Corp. 53; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; *Chicago & N. W. R. Co. v. Auditor*, 53 Mich. 91, 18 N. W. 586; *Racine & M. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, 95 Am. Dec. 595; *Rece v. Newport News & M. V. Co.*, 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572; *Bishop v. Brainerd*, 28 Conn. 289; *Duncan v. St. Louis, I. M. & S. Ry. Co.*, 49 La. Ann. 1700, 22 South. 924; *Georgia & A. Ry. Co. v. Stollenwerck*, 122 Ala. 539, 25 South. 258. In *Missouri Pac. Ry. Co. v. Meeh*, supra, it was said: "At this day it must be regarded as settled beyond doubt or controversy that two states of this Union cannot by their joint action create a corporation which will be regarded as a single corporate entity, and, for jurisdictional purposes, a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and be entitled to exercise within its borders, by the same board of directors and officers, all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name, having a different paternity." In *Chicago & N. W. R. Co. v. Auditor*, supra, Judge Cooley said: "It is impossible to conceive of one joint act performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but, when the two unite, they severally bring to the new entity the powers and privileges already

In the leading case of *Ohio & M. R. Co. v. Wheeler*,¹⁵⁴ the plaintiff described itself as a corporation created and existing under the laws of the states of Indiana and Ohio, having its principal office in Cincinnati, Ohio. It sued Wheeler in the circuit court of the United States for the district of Indiana, describing him as a citizen of Indiana. The supreme court of the United States held that there was no jurisdiction, on the ground of diverse citizenship. "It is true," it was said, "that a corporation by the name and style of the plaintiff appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects; and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state; and neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons; but the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life, and indues it with its faculties and powers. The President and Directors of the Ohio & Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States." As was said by the Illinois court, "the only possible status of a company acting under charters from two states is that it is an association incorporated in and by each of the states; and, when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits."¹⁵⁵

Charter Distinguished from License.

Acts of the legislature creating corporations must be distinguished from acts which merely recognize a corporation chartered by another

possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges." In *Quincy Railroad Bridge Co. v. Adams Co.*, 88 Ill. 615, 619, it is said: Two states "have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and, as such, create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state."

¹⁵⁴ 1 Black (U. S.) 286, 17 L. Ed. 130.

¹⁵⁵ *Quincy Railroad Bridge Co. v. Adams Co.*, 88 Ill. 615, 619.

er state, and allow it to do business within the state on compliance with certain conditions.¹⁵⁶ This distinction is illustrated by the case of *Baltimore & O. R. Co. v. Harris*.¹⁵⁷ The Baltimore & Ohio Railroad Company had been incorporated by an act of the legislature of Maryland. Afterwards the legislature of Virginia passed an act whereby, after reciting the Maryland act, it was declared "that the same rights and privileges shall be, and are hereby, granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act; and the same rights, privileges, and immunities which are reserved to the state of Maryland or to the citizens thereof are hereby reserved to the state of Virginia and her citizens." It was held in this case that the Virginia act was a mere license, and nothing more, and that the license was given to the Maryland corporation as such, and in no degree changed the character or status of that body; that it remained a Maryland corporation only, and therefore a Maryland citizen only for the purposes of federal jurisdiction.¹⁵⁸

On the other hand, the effect of an act adopting a foreign corporation may be to create it a domestic corporation.¹⁵⁹ Thus, where a Connecticut corporation, pursuant to its charter, purchased the franchises and railroad of a Rhode Island corporation, and the Rhode Island legislature ratified the purchase by an act which declared that the purchasing company should have all the rights, privileges, and

¹⁵⁶ *Quesenberry v. People's Building, L. & S. Ass'n*, 44 W. Va. 512, 30 S. E. 78; *Savage v. People's Building, L. & S. Ass'n*, 45 W. Va. 275, 31 S. E. 991; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

¹⁵⁷ 12 Wall. (U. S.) 65, 20 L. Ed. 354, 1 Cumming, Cas. Priv. Corp. 46.

¹⁵⁸ And see *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Morgan v. Railroad Co. (C. C.)* 48 Fed. 705; note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174, 175. See also, *Martin v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Goodloe v. Tennessee Coal, Iron & R. Co. (C. C.)* 117 Fed. 348; *Illinois Central R. Co. v. Sandford*, 75 Miss. 862, 23 South. 355, 942.

¹⁵⁹ *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; *Missouri Pacific Ry. Co. v. Meeh*, 69 Fed. 753, 759, 16 C. C. A. 510, 30 L. R. A. 250; *Uphoff v. Chicago, St. L. & N. O. R. Co. (C. C.)* 5 Fed. 545; *Granger's L. & H. Ins. Co. v. Kamper*, 73 Ala. 325. "To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers." *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83.

powers, and be subject to all the duties and liabilities, imposed upon the selling company by its charter, it was held that the purchasing company became a corporation of that state.¹⁶⁰ And where a general act provides that a foreign corporation desiring to do business in the state shall become a domestic corporation by filing there a copy of its charter, upon complying with the requirement it becomes a domestic corporation, and not a mere licensee.¹⁶¹

EXTENSION OF CHARTER—CREATION OF NEW CORPORATION.

39. It is competent for the legislature to extend a charter before it has expired, or to revive a charter after its expiration. An act extending the period of existence of a corporation beyond the time for which it was originally created, even under a new name, does not create a new corporation. If, however, a new corporation is intended to be created, though with the same name and the same members, the old and the new body are distinct corporations.

The legislature, subject to constitutional limitations, *may not only pass an act before the charter of a corporation expires, extending the same,¹⁶² but it may pass an act reviving a charter which has already expired, so as to revive the former corporation in all its original force, and not create a new one.¹⁶³ It is sometimes difficult

¹⁶⁰ *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780. And see *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196.

¹⁶¹ *Layden v. Knights of Pythias*, 128 N. C. 546, 39 S. E. 47. Cf. *St. Louis & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802.

* Where a charter is granted under one constitution, and is extended by act of the legislature under another, and when the time arrives for such extension to take effect there is a third constitution in force, the act can confer no privileges not authorized by the constitution in force at the time of its adoption, and is regulated, with respect to those granted by it, by the constitution in force when it takes effect. *State v. Citizens' Bank*, 52 La. Ann. 1086, 27 South. 709.

¹⁶² *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135, 1 Cumming, Cas. Priv. Corp. 464; *Augusta & S. R. Co. v. City Council of Augusta*, 100 Ga. 701, 28 S. E. 126. General laws authorizing the organization of corporations for limited terms commonly contain provisions for extending the corporate existence by act of the members for additional terms. See *Attorney General v. Perkins*, 73 Mich. 303, 41 N. W. 426; *Ovid Elevator Co. v. Secretary of State*, 90 Mich. 466, 51 N. W. 536; *People v. Green*, 116 Mich. 505, 74 N. W. 714; *People v. James*, 5 App. Div. 412, 39 N. Y. Supp. 313; *Smith v. Eastwood Mfg. Co.*, 58 N. J. Eq. 331, 43 Atl. 567; *Erb v. Grimes*, 94 Md. 92, 50 Atl. 397; *Coal Creek Min. & Mfg. Co. v. Tennessee Coal, I. & R. Co.*, 106 Tenn. 651, 62 S. W. 162.

¹⁶³ *President, etc., of Lincoln & K. Bank v. Richardson*, 1 Greenl. (Me.) 79, 10 Am. Dec. 34; *President & Selectmen of Port Gibson v. Moore*, 13 Smedes & M. (Miss.) 157.

to distinguish between an act creating a new corporation, with the same name and the same members as those of a former or an existing corporation, and an act which merely continues the existence of a corporation previously created. The distinction is important. For instance, if a statute grants special privileges to corporations thereafter incorporated, they cannot be claimed by a corporation previously created, though its charter may be afterwards extended.¹⁶⁴ Again, if a new corporation is created, though with the same name and the same members as those of an existing corporation, whose charter is about to expire, the new corporation is not liable for the debts of the old, while it is otherwise if the existence of the old corporation is merely extended.¹⁶⁵

A mere change of name, as we have seen, does not create a new corporate body.¹⁶⁶ "To ascertain whether a charter creates a new corporation or merely continues the existence of the old one, we must look to its terms, and give them a construction consistent with the legislative intent and the intent of the incorporators."¹⁶⁷ In a late Maryland case the act under consideration was entitled "An act to extend an act entitled 'An act to incorporate the Wither's Mining Company,' passed at the December session, 1847, chapt. 306"; and it provided that said act, and a subsequent act amending it, "be and the same are hereby continued in full force and effect" for 30 years, and declared, after giving the company a new name, "that the company by such name shall succeed to all the rights, powers, liabilities, and obligations" of the company as previously named. It was held that this did not create a new corporation, but merely continued the existence of the old one.¹⁶⁸ On the other hand, where a bank was created as a corporation, with the same name as that of an old bank, whose charter was about to expire, and the statutes and circumstances together showed that the legislature did not intend merely to continue the existing corporation, it was held that there was a new

¹⁶⁴ *Frostburg Min. Co. v. Cumberland & P. R. Co.*, 81 Md. 28, 31 Atl. 698. Cf. *Covington & L. Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560.

¹⁶⁵ *Bellows v. Bank*, 2 Mason, 81, Fed. Cas. No. 1,279. See, also, *Supreme Lodge v. Weller*, 93 Va. 605, 25 S. E. 891; *United Mines Co. v. Hatcher*, 79 Fed. 517, 25 C. C. A. 46.

¹⁶⁶ *Erb v. Grimes*, 94 Md. 92, 50 Atl. 397. Ante, p. 65.

¹⁶⁷ Per Mr. Justice Story, in *Bellows v. Bank*, supra. See, also, *Com. v. Licking Valley B. & L. Ass'n*, 82 S. W. 435, 26 Ky. Lay Rep. 730; *Allen v. North Des Moines M. E. Church*, 127 Iowa, 96, 102 N. W. 808, 69 L. R. A. 255, 109 Am. St. Rep. 366.

¹⁶⁸ *Frostburg Min. Co. v. Cumberland & P. R. Co.*, supra. See, also, *National Exchange Bank v. Gay*, 57 Conn. 224, 17 Atl. 555, 4 L. R. A. 343; *Higgins v. California Petroleum & A. Co.*, 122 Cal. 373, 55 Pac. 155.

and distinct corporation, though most of the stockholders were the same, and that the new bank, therefore, was not liable for the debts of the old bank.¹⁶⁹

40. PROOF OF CORPORATE EXISTENCE.

The sufficiency of the proof of corporate existence will depend to a great extent upon the nature of the proceeding in which the question is raised, and the circumstances of the particular case. In quo warranto proceedings by the state to test the right of an alleged corporation to exercise corporate powers, corporate existence de jure must be shown; and to show this it must be made to appear that there is a valid law creating or authorizing such a corporation, that there was a valid organization under it, and a substantial compliance with all conditions precedent.¹⁷⁰

On the other hand, as has been stated, if the question of corporate existence is raised collaterally, it is sufficient if a de facto existence be shown.¹⁷¹ Such proof is admissible, whenever the question comes up collaterally, as in a criminal prosecution for larceny, forgery, or any other crime against an alleged corporation;¹⁷² or in any civil proceeding, other than proceedings by the state to test the existence of the alleged corporation,¹⁷³ except, in some states, proceedings by the corporation to condemn land under the power of eminent domain.¹⁷⁴ As will be seen, by the weight of authority, it is only necessary, in order to prove de facto corporate existence, to show a valid law under which the alleged corporation might have been formed, a colorable bona fide compliance with that law, and an assumption of corporate powers, or user.¹⁷⁵

Again, as we shall see, there are many cases in which a party may, by his conduct, as by dealing with or holding out a body as a corporation, be estopped to deny its existence as a corporate body.¹⁷⁶ Here, by the weight of authority, it is not necessary to prove even a de facto corporate existence. All that is necessary is to show the facts that will operate as an estoppel.¹⁷⁷ Where a person has con-

¹⁶⁹ *Bellows v. Bank*, supra. And see *President & Selectmen of Port Gibson v. Moore*, 18 *Smedes & M. (Miss.)* 157; *Clough v. Rocky Mountain Oil Co.*, 25 *Colo.* 520, 55 *Pac.* 809.

¹⁷⁰ Ante, p. 49; post, p. 78.

¹⁷¹ Post, p. 78.

¹⁷² *Calkins v. State*, 18 *Ohio St.* 370, 98 *Am. Dec.* 121; *State v. Habib*, 18 *R. I.* 558, 30 *Atl.* 462.

¹⁷³ 1 *Mor. Corp.* § 37.

¹⁷⁴ Post, p. 80.

¹⁷⁵ Post, p. 78; *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 *W. Va.* 764, 12 *S. E.* 771.

¹⁷⁶ Post, p. 91.

¹⁷⁷ Post, p. 96.

tracted or dealt with an association as a corporation, proof of that fact alone is prima facie evidence of the corporate existence of the body as against him, as in an action by the alleged corporation on a subscription to its stock.¹⁷⁸

The mode of proving acts of the legislature is a question of the general law of evidence. There is no difference between the mode of proving the charter of a corporation and the mode of proving other legislative acts. A charter granted by a public statute need not be proved at all, for the courts must take judicial notice of all public acts.¹⁷⁹ Private acts, however, must be proved, for the courts do not take judicial notice of them.¹⁸⁰ For the mode of proving statutes, the reader must refer to works on evidence. Foreign laws, including charters granted by another state, must be proved.¹⁸¹

We have seen that acceptance of a charter by the corporators may, unless a particular mode of acceptance is prescribed by the legislature, be shown by proof of any act on the part of the corporators which shows an unequivocal intention to accept, as by showing that they organized and exercised corporate powers. If such acts are shown, acceptance will be presumed.¹⁸² Unless there is statutory requirement of other evidence, the organization of a corporation and user, for the purpose of showing a de facto existence, may be shown by parol evidence.¹⁸³ It has been said that general reputation of corporate existence is sufficient,¹⁸⁴ but this dictum cannot be supported by authority. There must be evidence, not only of an act authorizing incorporation and user of corporate powers, but also of organization in at least colorable compliance with the act.¹⁸⁵ The records, books, and minutes of a corporation, embracing the proceedings in its organization under its charter, or under the general law, when regular and identified by the person authorized to make them, are prima facie evidence of the organization of the corpora-

¹⁷⁸ *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729.

¹⁷⁹ *Hays v. Bank*, 9 Grat. (Va.) 127; *Bank of Utica v. Magher*, 18 Johns. (N. Y.) 341; *Williams v. Bank*, 2 Humph. (Tenn.) 339; *Stribbling v. Bank*, 5 Rand. (Va.) 132; *White Water Valley Canal Co. v. Boden*, 8 Blackf. (Ind.) 130.

¹⁸⁰ 1 Mor. Corp. § 38; *Ohio & I. R. Co. v. Ridge*, 5 Blackf. (Ind.) 78; *State v. Trustees of Vincennes University*, 5 Ind. 77, 87, 91; *Balley v. Trustees of Lincoln Academy*, 12 Mo. 174.

¹⁸¹ 1 Mor. Corp. § 39, *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314.

¹⁸² Ante, p. 46; *Bank of Manchester v. Allen*, 11 Vt. 302.

¹⁸³ *Calkins v. State*, 18 Ohio St. 370, 98 Am. Dec. 121; *State v. Habib*, 18 R. I. 558, 30 Atl. 462; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

¹⁸⁴ *Fleener v. State*, 58 Ark. 98, 23 S. W. 1.

¹⁸⁵ *State v. Murphy*, 17 R. I. 698, 24 Atl. 473, 10 L. R. A. 550; *Porter v. State*, 141 Ind. 488, 40 N. E. 1061; *Owen v. Shepard*, 8 O. C. A. 244, 59 Fed. 746.

tion.¹⁸⁶ When it is shown that there was an act authorizing the formation of an alleged corporation, that it was formed under the act, and has since acted as a corporation, compliance with particular provisions of the act will be presumed, in the absence of evidence to the contrary.¹⁸⁷

In many states it is provided by statute that a certified copy of the certificate or letters of incorporation or articles of association, filed with the secretary of state or other officer (the statutes necessarily varying in the different states), shall be prima facie evidence of corporate existence.¹⁸⁸ This, however, does not exclude other competent evidence of incorporation, unless it is expressly so provided.¹⁸⁹ In some states it is provided that, whenever it is necessary to prove the incorporation of a company, evidence that it is doing business under a certain name shall be prima facie evidence of its due incorporation.¹⁹⁰

If the certificate of incorporation and record thereof have been lost or destroyed, parol evidence is admissible to show compliance with the law in the organization of the company, and to prove the contents of the certificate; and it is not necessary that such evidence should be so minute as to permit of the reproduction of the certificate in all its details. It is sufficient if it is so full as to show that the law was complied with.¹⁹¹ Long acquiescence by the public in the exercise of the franchise in such a case raises a presumption of organization in conformity to law, in aid of the parol evidence.¹⁹²

¹⁸⁶ *Buncombe Turnpike Co. v. McCarson*, 18 N. C. 306; *Coffin v. Collins*, 17 Me. 440; *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538; *Semple v. Glenn*, 91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894; *Peake v. Railroad Co.*, 18 Ill. 88. If the acceptance of a charter is recorded on the books, they are the best evidence; and parol evidence is admissible only under the rules allowing secondary evidence. *Coffin v. Collins*, supra; *Hudson v. Carman*, 41 Me. 84. It must be made to appear that the books offered in evidence are the corporation books; that they have been kept as such; and that the entries have been made by an authorized person. *President, etc., of the Highland Turnpike Co. v. M'Kean*, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324.

¹⁸⁷ *Bank of U. S. v. Lyman*, 1 Blatchf. 297, Fed. Cas. No. 924; *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433.

¹⁸⁸ *Marshall v. Bank*, 108 N. C. 639, 13 S. E. 182; *Spokane & I. Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

¹⁸⁹ *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627; *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042.

¹⁹⁰ *Canal Street Gravel-Road Co. v. Paas*, 95 Mich. 372, 54 N. W. 907.

¹⁹¹ *Rose Hill & E. R. Co. v. People*, 115 Ill. 133, 3 N. E. 725.

¹⁹² *Rose Hill & E. R. Co. v. People*, supra.

CHAPTER III.

EFFECT OF IRREGULAR INCORPORATION.

- 41-42. Corporations De Facto.
- 43-44. Estoppel to Deny Corporate Existence.
- 45. Liability of Associates as Partners.

CORPORATIONS DE FACTO.

41. Where persons attempt, in good faith, to organize a corporation under a statute that is valid, and that authorizes such a corporation, and afterwards assume to exercise corporate powers, there is a corporation de facto, though, by reason of failure to comply with the statute, there may not be a corporation de jure; and the corporate character of the association can be questioned only by the state in a direct proceeding brought for that purpose. By the weight of authority, to constitute a corporation de facto within this rule, there must be
- (a) A valid law, and one which authorizes such a corporation.
 - (b) An attempt in good faith to organize under the statute.
 - (c) At least a colorable or apparent compliance with the statute.
 - (d) An assumption of corporate powers.
42. The doctrine concerning de facto corporations is based on grounds of public policy, and does not depend on any element of estoppel.

A corporation may exist in fact without being legally constituted. Such a corporation is called a corporation de facto, as distinguished from a corporation de jure. "This phrase [de facto] is used to characterize an officer, a government, a past action, or a state of affairs which exists actually and must be accepted for all practical purposes, but which is illegal or illegitimate. In this sense it is the contrary of 'de jure.'" ¹ The term "de facto," as applied to a corporation, means a body which actually exists, for all practical purposes, as a corporate body, but which, because of failure to comply with some provision of the law, has no legal right to corporate existence as against the state. A corporation de jure, on the other hand, is a corporation in law as well as in fact. Not even the state can deprive it of its corporate existence in violation of the terms of its charter.

The distinction between a corporation de jure and a corporation de facto is very important. A corporation de jure has a right to corporate existence even as against the state. The state cannot,

¹ Black, Law Dict. tit. "De Facto."

even by a direct proceeding, deprive it of this right, contrary to the terms of its charter. A corporation de facto has a corporate existence, even as against the state, where the state attacks its right collaterally; and it has such right as against private individuals, whether they attack its corporate existence collaterally or directly. The state, which alone has the power to incorporate, may waive irregularities in the organization of corporations; and, so long as the state remains inactive in the premises, individuals must acquiesce.²

"Where the law authorizes a corporation, and there is an effort, in good faith, to organize a corporation under the law, and thereupon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation de facto, and, as a general rule, the legal existence of such a corporation cannot be inquired into collaterally, although some of the required legal formalities may not have been complied with. Ordinarily, such an inquiry can only be made in a direct proceeding brought in the name of the state."³

A corporation de facto, that by regularity of organization might be one de jure, can make contracts, purchase, hold, and convey property, and sue and be sued, in the same manner as if it were a corporation de jure, for no one can object but the state. "A corporation de facto may legally do and perform every act and thing which the same entity could do and perform were it a de jure corporation. As to all the world except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted, its acts are to be treated as efficacious."⁴ "Mere irregulari-

² North v. State, 107 Ind. 356, 8 N. E. 159, and cases cited in the following notes.

³ Hasselman v. Mortgage Co., 97 Ind. 365.

⁴ People v. La Rue, 67 Cal. 530, 8 Pac. 84. And see Heaston v. Railroad Co., 16 Ind. 275, 79 Am. Dec. 430, 1 Cumming, Cas. Priv. Corp. 417, W. D. Smith, Cas. Corp. 20, and Shep. Cas. Corp. 134; Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; Eaton v. Aspinwall, 19 N. Y. 119; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75, 1 Cumming, Cas. Priv. Corp. 411; Lamming v. Galusha, 81 Hun, 247, 30 N. Y. Supp. 767; Thompson v. Candor, 60 Ill. 244; People v. Board, 111 Ill. 171; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Bushnell v. Machine Co., 138 Ill. 67, 27 N. E. 596; Appleton Mut. Fire Ins. Co. v. Jesser, 5 Allen (Mass.) 446; Butchers' & D. Bank v. McDonald, 130 Mass. 264, 1 Cumming, Cas. Priv. Corp. 420; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. 362; McTighe v. Construction Co., 94 Ga. 306, 21 S. E. 701, 3 L. R. A. 208, 47 Am. St. Rep. 153; Whitney v. Robinson, 53 Wis. 309, 10 N. W.

ties in organization cannot be shown collaterally, where there is no defect of power." ⁵ The doctrine is not limited in its application to domestic corporations, but extends to foreign corporations as well. ⁶

Some of the courts have held that the doctrine of *de facto* corporations does not apply to a case in which an alleged corporation attempts to exercise the power of eminent domain by the appropriation of private property to public use; that in such a proceeding, if the question is raised, it must show that it is a corporation *de jure*. ⁷ Other courts make no such distinction, but apply the doctrine in condemnation proceedings, as well as in other cases. ⁸

If a pretended corporation is neither a corporation *de jure* nor one *de facto*, it has no standing whatever, and its corporate existence

512; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Pape v. Bank*, 20 Kan. 440, 27 Am. Rep. 183; *Chicago K. & W. R. Co. v. Stafford Co. Com'rs*, 36 Kan. 121, 12 Pac. 593; *Upton v. Hansbrough*, 3 Bliss. 417, Fed. Cas. No. 16,801; *Toledo, St. Louis & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Marion Bond Co. v. Mexican Coffee & R. Co.*, 160 Ind. 558, 65 N. E. 748; *Mayor, etc., of Wilmington v. Addicks*, 7 Del. 56, 43 Atl. 297; *Hoover Mercantile Co. v. Evans Min. Co.*, 193 Pa. St. 28, 44 Atl. 277; *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229, 44 Atl. 284; *Supreme Court I. O. Foresters v. Supreme Court U. S. Foresters*, 94 Wis. 234, 68 N. W. 1011; *Los Angeles Holliness Band v. Spires*, 126 Cal. 541, 58 Pac. 1049; *Marsh v. Mathias*, 19 Utah, 350, 56 Pac. 1074; *Tennessee Automatic Lighting Co. v. Massey* (Tenn. Ch. App.) 56 S. W. 35. "The reason is that, if rights and franchises have been usurped, they are the rights and franchises of the sovereign, and he alone can interpose. Until such interposition, the public may treat those possessing and exercising corporate powers under color of law as doing so rightfully. The rule is in the interest of the public, and is essential to the safety of business transactions with corporations." *Duggan v. Investment Co.*, 11 Colo. 113, 17 Pac. 105.

⁵ *Heaston v. Railroad Co.*, *supra*.

⁶ *Bank of Toledo v. International Bank*, 21 N. Y. 542; *Lancaster v. Improvement Co.*, 140 N. Y. 576, 35 N. B. 964, 24 L. R. A. 322; *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931; *post*, p. 624.

⁷ *Atlantic & O. R. Co. v. Sullivant*, 5 Ohio St. 276; *Atkinson v. Railroad Co.*, 15 Ohio St. 21; *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245; *In re Broadway & S. A. R. Co.*, 73 Hun, 7, 25 N. Y. Supp. 1080; *Orrick School Dist. v. Dorton*, 125 Mo. 439, 28 S. W. 765.

⁸ *Reisner v. Strong*, 24 Kan. 410; *McAuley v. Railway Co.*, 83 Ill. 348; *Ward v. Railroad Co.*, 119 Ill. 287, 10 N. E. 365; *Wellington & P. R. Co. v. Cashie & C. R. & L. Co.*, 114 N. C. 690, 19 S. E. 646 (but see *Kinston & C. R. Co. v. Strond*, 182 N. C. 413, 43 S. E. 913); *Oregon Short Line Co. v. Postal Tel. Cable Co.*, 111 Fed. 842, 49 O. C. A. 663; *Postal Tel. Cable Co. v. Oregon Short Line Co.* (C. C.) 114 Fed. 787; *Morrison v. Foreman*, 177 Ill. 427, 53 N. E. 73; *Postal Tel. Cable Co. v. Oregon S. L. R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Union Pacific R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

may be questioned collaterally, and by a private individual as well as by the state,⁹ provided there is no element of estoppel.¹⁰

By the better opinion, though there are decisions to the contrary, after the period of existence of a corporation has expired by force of express provision in its charter or in a general law, it is not even a corporation de facto. By the expiration of its charter it becomes ipso facto dissolved, and no longer has any existence at all.¹¹ It follows that its existence after that time can be questioned by any person who has not estopped himself, and collaterally as well as directly. Thus, if a pretended corporation, after expiration of its charter, assumes to execute a conveyance, and the grantee, or one claiming under him, sues a third person, who holds adversely, to recover possession, the latter may question the validity of the conveyance, and dispute the existence of the corporation.¹²

The doctrine concerning de facto corporations does not prevent a collateral attack on the right of a corporation to exercise a franchise separate and distinct from the franchise of being a corporation. It has been held, for instance, that, even conceding that the right of an association to exist as a corporation after the expiration of the time limited in its charter cannot be questioned by a private individual in a collateral proceeding, he can thus question the right of a corporation to take tolls after the expiration of the period during which it was authorized to take tolls, as he does not thereby question its corporate existence.¹³

What is Necessary to Constitute a Corporation De Facto.

Having once determined that a particular association is a corporation de facto, there is little difficulty in applying the principles of law as stated above. But there is much confusion and direct conflict in the decisions as to what constitutes a corporation de facto, as distinguished from an association which pretends to be a corporation, but which has no existence at all as such, either de jure or de

⁹ *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362.

¹⁰ *Post*, p. 91.

¹¹ *Bradley v. Reppell*, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685. And see *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Dobson v. Simonton*, 86 N. C. 492; *Krutz v. Town Co.*, 20 Kan. 397. Contra, *Bushnell v. Machine Co.*, 138 Ill. 67, 27 N. E. 596; *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 18 Am. St. Rep. 903. See *post*, p. 231.

¹² *Bradley v. Reppell*, *supra*.

¹³ *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585.

facto. And the books do not throw as much light on the question as might be expected.¹⁴

Most of the courts hold that there is a corporation de facto whenever there is a valid law under which a particular kind of corporation may lawfully be organized, and persons having the required qualifications undertake, in good faith, to organize such a corporation thereunder, comply at least colorably with the law, and afterwards assume to act as a corporation, though particular provisions of the law are not complied with. And they hold that it is altogether immaterial, in such a case, whether compliance with the particular provisions was intended by the legislature as a condition precedent to the formation of the corporation or not. Thus, an association has been held a corporation de facto, though there was not sufficient notice of the meetings held for the purpose of organizing, and though the certificates of incorporation were not properly executed, acknowledged, or recorded, as required by the statute.¹⁵ And there are many other cases to the same effect, or apparently so.¹⁶ All that is necessary, according to this doctrine.

¹⁴ The state of the authorities on this subject is thus described by Judge Thompson in his late work on Corporations: "It is impossible to formulate a rule on the subject of de facto corporations, which will be applicable in all American jurisdictions, or which will receive uniform support from the decisions in any one such jurisdiction. Those decisions oscillate between two extreme views; (1) That where a body of men act as a corporation, and in the ostensible possession of corporate powers, it will be conclusively presumed, in all cases except in a direct proceeding against them by the state to vacate their franchises, that they are a corporation. (2) That the conditions named in statutes authorizing the organization of corporations are conditions precedent, and must be strictly complied with, or the corporation does not exist; and that the want of compliance with any one condition precedent may be shown by any one, in a private litigation with the pretended corporation, unless he has estopped himself by his conduct from challenging its corporate existence, and frequently without reference to the question of estoppel." 1 Thomp. Corp. § 495.

¹⁵ East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260.

¹⁶ See Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. 362; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Methodist Church v. Pickett, 19 N. Y. 482, 1 Cumming, Cas. Priv. Corp. 407; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357; Williamson v. Association, 89 Ind. 389; North v. State, 107 Ind. 356, 8 N. E. 159; Cochran v. Arnold, 58 Pa. St. 399; Thompson v. Candor, 60 Ill. 244; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Bushnell v. Machine Co., 138 Ill. 67, 27 N. E. 596; Merriman v. Magliveny, 12 Heisk. (Tenn.) 494; Pape v. Bank, 20 Kan. 440, 27 Am. Rep. 183; Haas v. Bank, 41 Neb. 754, 60 N. W. 85; Humphreys v. Mooney, 5 Colo. 282; Jones v. Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Jones v. Hale, 32 Or. 465, 52 Pac. 311; Marsh v. Mathias, 19 Utah, 350, 56 Pac. 1074; Keys v. Smith, 67 N. J. Law, 190, 51 Atl. 122;

is that there shall be a law under which such a corporation as the one in question might have been formed, that there shall have been a bona fide attempt to organize, and a colorable compliance with the provisions of the law, and that there shall have been an assumption of corporate powers, or "user," as it is termed. "Where it is shown that there is a charter or law under which a corporation, with the powers assumed, might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation de facto is established."¹⁷ "Two things are necessary to be shown to establish a corporation de facto, viz.:

(1) The existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law. If the law exists, and the record exhibits a bona fide attempt to organize under it, very slight evidence of user beyond this is all that can be required."¹⁸

Same—Necessity for Valid Law Authorizing Incorporation.

In the first place, by the weight of authority, it is always essential to the existence of a corporation de facto that there shall be some law under which such a corporation might have been legally created or organized. If there is no law at all authorizing the formation of such a corporation, there can be no corporation de facto, even though there may have been an assumption of corporate powers. In a Wisconsin case there had been an attempt to organize two churches into one corporate body, whereas the statute only authorized a corporation composed of one church. It was held that the association was not even a corporation de facto. "To be a

Lusk v. Riggs, 70 Neb. 718, 102 N. W. 88 (modifying judgment 70 Neb. 713, 97 N. W. 1033, on rehearing).

¹⁷ *Stout v. Zulick*, *supra*.

¹⁸ *Eaton v. Walker*, *supra*. It will be noticed that, while the court here says that two things only are necessary to constitute a de facto corporation, namely, the law authorizing incorporation, and user under that law, it proceeds at once to specify a third essential; that is, "a bona fide attempt to organize" under the law. And it is clear that all three of these things are necessary. See *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147; *Duggan v. Investment Co.*, 11 Colo. 113, 17 Pac. 105; *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569. "The requisites to constitute a corporation de facto are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise." Per Peckham, J., in *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773.

corporation de facto," it was said, "it must be possible to be a corporation de jure; and acts done in the former case must be legally authorized to be done in the latter, or they are not protected or sanctioned by the law. Such acts must have an apparent right."¹⁹ Within this rule, an unconstitutional law must be regarded as the same as no law at all.²⁰ There are a few cases which hold that a de facto corporation may exist under an unconstitutional act,²¹ but it is difficult to see how they can be supported, when we consider that "an unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as if it had never been passed."²² As we have seen, after the period of existence of a corporation has expired by express limitation in its charter or in a general law, it is not a corporation de facto. There is no law under which it can exist.²³

¹⁹ *Evenson v. Ellingson*, 67 Wis. 634, 31 N. W. 342. And see *Abbott v. Refining Co.*, 4 Neb. 416; *State v. Critchett*, 37 Minn. 13, 32 N. W. 787; *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153; *Davis v. Stevens* (D. C.) 104 Fed. 235; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 54 N. E. 407, 72 Am. St. Rep. 326. But where the statutes of a state authorized the consolidation of railroad companies of the state with those of other states under certain conditions or circumstances, it was held that a consolidation of such companies created a de facto corporation, even though the constituent companies did not possess the qualifications required by the statutes to render the consolidated company a corporation de jure, and its corporate existence could be questioned on that ground only by the state. *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155. See, also, *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* (C. C.) 82 Fed. 642, 650; *Cf. Whaley v. Bankers' Union* (Tex. Civ.) 88 S. W. 259.

²⁰ *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *Burton v. Schildbach*, 45 Mich. 504, 8 N. W. 497; *Green v. Graves*, 1 Doug. (Mich.) 351; *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *Clark v. American Cannel Coal Co.*, 165 Ind. 213, 73 N. E. 1083. In *McTighe v. Macon Const. Co.*, 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153, it was held, after a review of the cases, and a consideration of the reasons on which the doctrine of de facto corporations is based, that a corporation attempted to be created by a special act, which is unconstitutional, may, nevertheless, exist as a de facto corporation, if there is a general law under which it might have been incorporated.

²¹ *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400; *Commonwealth v. Philadelphia County*, 193 Pa. St. 236, 44 Atl. 336; *Richards v. Minnesota Savings Bank*, 75 Minn. 196, 77 N. W. 822. And see the dictum in *Winget v. Association*, 128 Ill. 67, 21 N. E. 12.

²² *Norton v. Shelby Co.*, 118 U. S. 442, 6 Sup. Ct. 1121, 30 L. Ed. 178.

²³ *Ante*, p. 81.

Same—Necessity for Bona Fide Attempt to Organize.

It is also essential to de facto corporate existence that there shall have been a bona fide attempt to organize under the law, and at least a colorable compliance with the law in such attempt.* “To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a de facto corporation, might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. * * * ‘Color of apparent organization under some charter or enabling act’²⁴ does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the corporation from being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto.”²⁵

* Where partners agreed to do business as a corporation, fulfilling part of the statutory requirements of incorporation, but omitting certain essentials, with the intention of stopping short of the creation of a corporation, such action did not create a corporation de facto as between themselves. *Card v. Moore*, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105. Where an attempt was made to organize a banking corporation at a time when no statute authorized it, and the bank was conducted and held itself out as a corporation, and afterwards a statute was enacted under which a corporation with the powers assumed might have been organized, and the bank continued to hold itself out as incorporated, but did not attempt to comply with the statute, it was held that the bank was a de facto corporation. *State v. Stevens*, 16 S. D. 309, 92 N. W. 420. See, also, to the same effect, *Mason v. Stevens*, 16 S. D. 320, 92 N. W. 424. And see *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44. These decisions seem questionable, since, while there was an attempt to organize, there was none to organize under the law. See 16 Harv. Law Rev. 362.

²⁴ The court had previously quoted from *Taylor on Corporations*: “When a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally.” *Tayl. Corp.* 145.

²⁵ *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552. And see *Bash v. Mining Co.*, 7 Wash. 122, 34 Pac. 464; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *In re Gibbs Estate*, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; *Johnson v. Okerstrom*,

Same—Sufficiency of Compliance with Law.

There are some cases that hold, and some that seem to hold, that there cannot be even a de facto corporation unless the incorporators have substantially complied with all the conditions precedent prescribed by the statute; that, without such compliance, the pretended corporation does not come into existence for any purpose; and that, in the absence of elements of estoppel, the objection may be raised by a private individual as well as by the state, and collaterally as well as directly.²⁶ These cases, however, are contrary to the great weight of authority, and some of them are not easily reconciled with other decisions of the same court. To constitute a corporation de facto there must, it is true, be a colorable compliance with the statute, but there need not be more. There need not be a substantial compliance. A substantial compliance makes the body a corporation de jure.²⁷ As was said by the Minnesota court, if there be an "apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the corporation from being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto."²⁸ That a colorable or apparent compliance, in good faith, with the provisions of the law, is sufficient, is shown by cases in almost all of the states.²⁹ Some of the cases in which the courts

70 Minn. 303, 73 N. W. 147; Washington Nat. Building, L. & I. Ass'n v. Stanley, 38 Or. 319, 63 Pac. 489, 84 Am. St. Rep. 793, '58 L. R. A. 816.

²⁶ Thus, in *Utley v. Tool Co.*, 11 Gray (Mass.) 139, a case in which it was sought to charge the defendants as stockholders of an alleged corporation with personal liability for its debts, the defense was that there were no written articles of agreement in the organization of the alleged corporation, as required by the statute under which the organization was attempted, and the defense was allowed. So, in *Bigelow v. Gregory*, 73 Ill. 197, certain persons undertook to organize a corporation under a general law which required the articles of association to be published in a certain way, and a certificate of the purposes of the incorporation to be filed in certain public offices; but they failed to comply with these provisions. It was held that there was no corporation de facto, though articles of association were executed, a common name adopted, and business conducted under it; and the associates were held liable as partners for goods sold to them. See, also, *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342; 1 *Cumming, Cas. Priv. Corp.* 69; *Kaiser v. Bank*, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85, *Shep. Cas. Corp.* 268; *Hurt v. Salisbury*, 55 Mo. 310; *McLennan v. Hopkins*, 2 Kan. App. 260, 41 Pac. 1061; *Bergeron v. Hobbs*, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85.

²⁷ Ante, p. 52.

²⁸ *Finnegan v. Noerenberg*, 52 Minn. 289, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552.

²⁹ See *Thompson v. Candor*, 60 Ill. 244; *Bushnell v. Machine Co.*, 138 Ill. 67, 27 N. E. 596; *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622; *Hudson*

have allowed a collateral attack on the authority of an association to exercise corporate powers, where there was a valid law under which it might be incorporated, a bona fide attempt at incorporation under it, and user of corporate powers, may perhaps be explained on the ground that the court did not consider that there had been even a colorable or apparent compliance with the law.³⁰

Same—Necessity for User of Corporate Powers.

To constitute a de facto corporation it is also essential that the parties shall have assumed in some way the appearance of a corporation, and shall have pretended to act as a corporate body. If, after an attempt at incorporation, in which conditions precedent are not complied with, the directors named in the articles never meet, and no stock is issued nor corporate act done, the association is not a corporation de facto.³¹ The mere fact that the owners of a mine use a corporate name does not make a corporation de facto, where no corporate act is performed, and no steps have been taken to incorporate.³² As was said in a Michigan case, however, "if the law exists, and the record exhibits a bona fide attempt to organize under it, very slight evidence of user beyond this is all that can be required."³³

v. Seminary Corp., 113 Ill. 618; *Duggan v. Investment Co.*, 11 Colo. 113, 17 Pac. 105; *Franke v. Mann*, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; *Gilman v. Druce*, 111 Wis. 400, 87 N. W. 557; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 31 So. 81, 90 Am. St. Rep. 907; *Huntington Mfg. Co. v. Schofield*, 28 Ind. App. 95, 62 N. E. 106. *Lusk v. Riggs*, 70 Neb. 718, 102 N. W. 88 (modifying judgment 70 Neb. 713, 97 N. W. 1033, on rehearing). In *Duggan v. Investment Co.*, supra, it was sought to avoid a mortgage given by a corporation on the ground that its certificate of incorporation was defective because it was not acknowledged as required by the statute. The court said: "We are aware of the distinction between mere omissions or irregularities, and what are called 'prerequisites' of the statutes. The distinction may well be taken in a direct proceeding or other exceptional cases where strict proof is required, but we do not regard it as having any controlling place in the case at bar. What is or what is not a prerequisite is often a difficult question for a professional man, and much more for a layman, to determine. To cast such a burden upon the public as between its individual members is to lose sight of the reason for, and largely abrogate, the salutary rule respecting de facto corporations."

³⁰ Compare *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552, with *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799.

³¹ *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151. See also, *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Card v. Moore*, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 508, 66 N. E. 1105; *Elgin Nat. Watch Co. v. Loveland (O. C.)* 132 Fed. 41.

³² *Bash v. Mining Co.*, 7 Wash. 122, 84 Pac. 462.

³³ *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

Same—Where Attempted Organization is a Fraud upon the Act.

If the attempted organization of a corporation was a fraud upon the act under which corporate existence is claimed, the better opinion is that there is no corporation, even de facto. Thus, where citizens of New Jersey went over into New York, and there attempted to form a corporation under the laws of that state for the purpose of doing business in New Jersey, it was held that there was no corporation de facto, since, under the circumstances of that particular case, the attempted organization was a fraud upon the laws of New York.³⁴ So, where persons not named in a charter creating a corporation to be located at a certain place, got control of the charter, and attempted to establish a corporation under it, to be located at a different place, it was held that the pretended corporation was not even a de facto corporation.³⁵

The Doctrine of De Facto Corporations Distinct from the Doctrine of Estoppel.

Much of the confusion in the cases as to corporations de facto results from a failure to distinguish between the doctrine of corporations de facto and the doctrine of equitable estoppel.³⁶ They are not the same thing, but entirely different doctrines. No elements of estoppel are necessary to prevent a private individual from objecting to the existence of a corporation de facto; and, as we shall see, a man may, on equitable grounds, be estopped to question the corporate character of an association that is not even a corporation de facto. The rule relating to de facto corporations, said the Minnesota court, "is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of or-

³⁴ Hill v. Beach, 12 N. J. Eq. 31. See Empire Mills v. Alston Grocery Co. (Tex. App.) 15 S. W. 200, 505, Shep. Cas. Corp. 64. Where a corporation is organized without capital to cover a real partnership, and to permit the carrying on of a partnership business without personal liability, the existence of the pretended corporation is open to collateral attack as a fraudulent device, except as to persons who have contracted with it as a corporation in such way as to estop themselves to show the fraud. Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 South. 566. And see Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105.

³⁵ Wonderly v. Booth, 36 N. J. Law, 250. Cf. Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; Id., 49 N. J. Eq. 329, 24 Atl. 560.

³⁶ For examples, see Hamilton v. Railroad Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Bates v. Wilson, 14 Colo. 140, 24 Pac. 99, 104; Foster v. Moulton, 35 Minn. 458, 29 N. W. 155.

ganization.”⁸⁷ The law forbids a private individual to question the right of a corporation de facto to existence as a corporation, not because of any conduct on his part which renders it inequitable to allow him to do so, for the doctrine extends to persons who have had no dealings whatever with the corporation, but because, irrespective of any question as to his position or conduct, it is contrary to public policy to allow any private individual to do so. No man can deny that a particular association is a corporation de facto, if he has so acted as to be equitably estopped, but, if not so estopped, he can. No man at all can question the corporate existence of a de facto corporation. This distinction is recognized by the Alabama court in a case in which it is said that, before a suit can be maintained by an alleged corporation, its actual or de facto existence must be proved, “or else a state of facts shown which will operate to estop the defendant from denying such de facto existence.”⁸⁸ In a great many cases it is said that “a person who has entered into a contract” with a “de facto” corporation in its corporate name and capacity cannot, in the absence of fraud, afterwards disregard the existence of the corporation, and sue the stockholders individually as partners on the contract, or defeat an action by the corporation on the contract.⁸⁹ This is a confusion of principles. They would be estopped in such a case to deny the existence of the corporation, whether it is a corporation de facto or not. These cases, therefore, are more properly considered under the doctrine of estoppel. If the corporation is a de facto one, then it is not necessary that a private individual shall have dealt with it in order that he may be prevented from questioning its corporate existence.

In an Ohio case, the plaintiff admitted that persons who have recognized the existence of a pretended corporation by their transactions with it as a corporation are estopped to deny its corporate existence; but it was contended that, as the plaintiff had engaged in no transactions with the alleged corporation in this case, he was

⁸⁷ *East Norway Lake Church v. Froislie*, 37 Minn. 447, 35 N. W. 260. And see *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357 (collecting cases); *Williamson v. Association*, 89 Ind. 389; *Pape v. Bank*, 20 Kan. 440; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668.

⁸⁸ *Schloss v. Trade Co.*, 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51.

⁸⁹ See *Snider's Sons Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Swartwout v. Railroad Co.*, 24 Mich. 390; *Butchers' & Drovers' Bank v. McDonald*, 130 Mass. 264, 1 Cumming, Cas. Priv. Corp. 420; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 507, 36 C. C. A. 155; *Slocum v. Head*, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 31 So. 81, 90 Am. St. Rep.

free to challenge its existence as a corporation de facto as well as de jure,—the argument being that “no case can be found where it is held that there is a corporation de facto against persons who have in no way recognized its existence as a corporation;” and that “the notion of a de facto corporation is based on the doctrine of estoppel. When estoppel cannot be invoked, there can be no de facto corporation.” The court, however, declined to take this view, and held that it is a rule, entirely irrespective of any question of estoppel, that no private individual can attack the corporate character of a de facto corporation. In its opinion the court said: “The theory that a de facto corporation has no real existence—that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence—has no foundation, either in reason or authority. A de facto corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation. * * * It is bound by all such acts as it might rightfully perform as a corporation de jure. Where it has attempted, in good faith, to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it,—no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon, in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.” 40

40 *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357.

ESTOPPEL TO DENY CORPORATE EXISTENCE.

- 43.** Where persons pretend to form a corporation, and assume to exercise corporate powers, an estoppel to deny that they are a corporation operates as against
- (a) The persons who so hold themselves out as a corporation.
 - (b) The pretended corporation itself.
 - (c) Third persons who deal with the association as a corporation except in the cases hereafter mentioned.
- 44. EXCEPTIONS—**To the rule above stated there are exceptions. Though there are some conflicting decisions by the weight of authority the doctrine does not apply.
- (a) Where the dealings relied upon as an estoppel are not such as to show recognition of the association as a corporation.
 - (b) Where there are no equitable grounds for applying it, and, a fortiori, where to apply it would be inequitable.
 - (c) A few cases hold that the doctrine does not apply where the assumption of corporate powers was unlawful as being in violation of a prohibitory law.
 - (d) In a few states the doctrine is held to apply to such associations only as are at least corporations de facto; but by the weight of authority it is not to be so limited.

It is a well-settled rule, subject to very few, if any, exceptions, that, where persons undertake to form a corporation, and afterwards assume to act as a corporate body, neither they nor the association can dispute its corporate existence and authority to act as such, when it is sued as a corporation on a contract into which it has entered in that character.⁴¹ Nor under such circumstances can the associates deny the corporate character of the association, in order to escape statutory liability for its debts.⁴² Nor can they do so in order

⁴¹ Scheufler v. Grand Lodge, 45 Minn. 256, 47 N. W. 799; Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 287; Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co. (O. C.) 67 Fed. 49; Callender v. Railroad Co., 11 Ohio St. 516; Stewart Paper Manuf'g Co. v. Rau, 92 Ga. 511, 17 S. E. 748; Fitzpatrick v. Rutter, 160 Ill. 282, 43 N. E. 392; Hamilton v. Railroad Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764, 12 S. E. 771; Independent Order of Mutual Aid v. Paine, 122 Ill. 625, 14 N. E. 42. See, also, Dooley v. Cheshire Glass Co., 15 Gray (Mass.) 494, 1 Cumming, Cas. Priv. Corp. 418.

⁴² Slocum v. Gas-Pipe Co., 10 R. I. 112; Slocum v. Warren, Id. 116; Building & Loan Ass'n of Dakota v. Chamberlain, 4 S. D. 271, 56 N. W. 897; Corey v. Merrill, 61 Vt. 598, 17 Atl. 841; Hamilton v. Railroad Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Freeland v. Insurance Co., 94 Pa. 504; Wheelock v. Kost, 77 Ill. 296; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83; McDonnell v. Insurance Co., 85 Ala. 401, 5 South. 120; Eaton v. Aspinwall, 19 N. Y. 119; McClinch v. Sturgis, 72 Me. 288; Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730.

to avoid liability on their subscriptions to stock in the pretended corporation, when sued thereon either by it, or by its creditors, or by a receiver or assignee.⁴³ The estoppel also operates in actions and controversies between the associates themselves.⁴⁴ Not only may the associates themselves, and the association or pretended corporation, be thus estopped, but third persons may be estopped by dealing with the association as a corporation.* Thus, it has frequently been held that entering into a contract with an association as a corporation will operate as an estoppel to dispute its existence as a corporation, in an action brought on the contract, unless there are

⁴³ *Wadesboro Cotton Mills Co. v. Burns*, 114 N. C. 353, 19 S. E. 238; *Hickling v. Wilson*, 104 Ill. 54; *Weinman v. Railway Co.*, 118 Pa. 192, 12 Atl. 288; *Parker v. Railroad Co.*, 33 Mich. 23; *Cravens v. Mills Co.*, 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; *Anderson v. Railroad Co.*, 12 Ind. 376, 74 Am. Dec. 218; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *American Homestead Co. v. Linnigan*, 46 La. Ann. 1118, 15 South. 369; *Upton v. Hansbrough*, 3 Bliss. 417, Fed. Cas. No. 16,801; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Montpeller & W. R. R. Co. v. Langdon*, 46 Vt. 284; *Torras v. Raeburn*, 108 Ga. 345, 33 S. E. 989; *United Growers' Co. v. Elsner* (Sup.) 47 N. Y. Supp. 906; *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; *American Alkali Co. v. Campbell* (C. C.) 113 Fed. 398. This rule has no application to one who subscribes for stock previous to and in anticipation of incorporation, and who has not by his subsequent acts acquiesced in the mode of incorporation. In such a case it is an implied condition of his subscription that the proposed corporation shall be legally and regularly organized; and, if it is not, he may set it up as a defense when sued on his subscription. *Schloss v. Trade Co.*, 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; post, p. 94, note 50. If, however, a subscriber to stock in a corporation to be formed takes active part in its organization, or in its management after organization, he cannot be heard to say that it was not legally organized. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435, 456; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536; *Hause v. Mannheim*, 67 Minn. 194, 69 N. W. 810; *Tanner v. Nichols*, 80 S. W. 225, 25 Ky. Law Rep. 2191.

⁴⁴ See *Bushnell v. Machine Co.*, 138 Ill. 67, 27 N. E. 596; *Curtis v. Tracey*, 169 Ill. 233, 48 N. E. 399, 61 Am. St. Rep. 168; *Anderson v. Thompson*, 51 La. Ann. 727, 25 So. 399.

* *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* (C. C.) 82 Fed. 642; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155; *Seven Star Grange v. Ferguson*, 98 Me. 176, 56 Atl. 648. Where persons assuming to be a corporation as such executed an assignment for creditors, a creditor who filed his claim with the assignee thereby elected to treat the company as a corporation. *Clausen v. Head*, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. 933.

special circumstances to take the case out of the general rule, whether it be brought by the pretended corporation,⁴⁵ or by the other party, in disregard of the corporate existence of the association, to charge the members individually as partners.⁴⁶ As to the latter proposition, however, there is some doubt, and there are well-considered cases against it.⁴⁷

⁴⁵ *Methodist Church v. Pickett*, 19 N. Y. 482, 1 Cumming, Cas. Priv. Corp. 407; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 15 N. E. 311; *Minnesota Gaslight Economizer Co. v. Denslow*, 46 Minn. 171, 48 N. W. 771; *Jones v. Foundry Co.*, 14 Ind. 89; *Fresno Canal & Irr. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Swartwout v. Railroad Co.*, 24 Mich. 390; *Cahall v. Association*, 61 Ala. 232; *Douglass County Com'rs v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Tarbell v. Page*, 24 Ill. 46; *Winget v. Association*, 128 Ill. 67, 21 N. E. 12; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Building & Loan Ass'n v. Chamberlain*, 4 S. D. 271, 56 N. W. 897; *Butchers' & D. Bank v. McDonald*, 130 Mass. 264, 1 Cumming, Cas. Priv. Corp. 420; *Worcester Medical Inst. v. Harding*, 11 Cush. (Mass.) 285; *Lehman v. Warner*, 61 Ala. 455; *Close v. Glenwood Cemetery*, 107 U. S. 477, 2 Sup. Ct. 267, 27 L. Ed. 408; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. (O. C.)* 23 Fed. 232; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Hassinger v. Ammon*, 160 Pa. 245, 28 Atl. 679; *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337; *Manship v. New South Building & L. Ass'n (C. C.)* 110 Fed. 845; *Deltch v. Staub*, 115 Fed. 309, 53 O. C. A. 137; *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109, 68 N. W. 370, 59 Am. St. Rep. 522; *Fayetteville Waterworks Co. v. Tillinghast*, 119 N. C. 343, 25 S. E. 960; *Kalamazoo v. Kalamazoo Heat, etc., Co.*, 124 Mich. 74, 82 N. W. 811; *First Congregational Church v. Grand Rapids School Furniture Co.*, 15 Colo. App. 46, 60 Pac. 948; *West Missouri Land Co. v. Kansas City S. B. Ry. Co.*, 161 Mo. 595, 61 S. W. 847. Thus, the grantor in a deed in favor of a body professing to be a corporation and acting as such, and any person claiming under him, is estopped to deny the corporate existence of the grantee, for the purpose of defeating the deed. *Broadwell v. Merritt (Mo. Sup.)* 1 S. W. 855; *Whitney v. Robinson*, 53 Wis. 309, 10 N. W. 512. And the execution of a note or bond payable to a body as a corporation is an admission by the maker or obligor of its corporate existence, which will estop him from denying it. *Stoutimore v. Clark*, 70 Mo. 471; *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29; *Brickley v. Edwards*, 131 Ind. 3, 30 N. E. 708; *John v. Bank*, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; *School Dist. No. 61 v. Alderson*, 6 Dak. 145, 41 N. W. 466; *Booske v. Ice Co.*, 24 Fla. 550, 5 South. 247.

⁴⁶ See *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Cochran v. Arnold*, 58 Pa. 399. And see *Shields v. Land Co.*, 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700; *Phinzy v. Railroad Co. (C. C.)* 62 Fed. 678; *Bradford v. Railroad Co.*, 142 Ind. 383, 40 N. E. 741, 41 N. E. 819; *Black River Imp. Co. v. Holway*, 85 Wis. 344, 55 N. W. 418; *Johnston v. Gumbel (Miss.)* 19 South. 100. In the latter case it was held that creditors of a corporation, having dealt with it in its corporate capacity, cannot attack an assignment by it on the ground of irregularities in its organization.

⁴⁷ Post, p. 100, notes 71-73.

Necessity for Recognition of Corporate Existence.

To warrant holding a person estopped from denying the existence of a corporation because he has dealt with it, his dealings must have been such as to show a recognition of the corporate character of the body.* A man cannot be so estopped by acts which are just as consistent with the existence of an unincorporated association as of one incorporated, for "estoppels never arise from ambiguous facts; they must be established by those that are unequivocal, and not susceptible of two constructions."⁴⁸ Thus, the mere fact that a man accepted the office of treasurer of an association will not estop him from denying that the association was a corporation; nor will the members of a religious association, for instance, be estopped to deny its existence as a corporation by the fact that they held the ordinary meetings of a religious society, passed by-laws, elected officers, etc., for these acts are just as consistent with the existence of an unincorporated association as of a corporation.⁴⁹ On the same principle it has been held that, though a person who has co-operated in the organization and acts of a body as a corporation will be estopped from disputing its corporate character, a person who merely subscribes for stock in a corporation not yet formed, and makes a payment thereon preliminary to its organization, but who does nothing to recognize the body as duly incorporated, will not be estopped to deny its de facto existence.⁵⁰ And a person who contracts with an association in ignorance of its claim to corporate existence is not thereby estopped to sue the associates as partners.⁵¹ The mere fact

* Where partners who had been carrying on business as a corporation entered into a written agreement reciting the existence of the supposed corporation merely for prudential reasons, and with no intention to create a corporation or belief that one had been created, the recital of incorporation did not estop one partner to deny corporate existence as against parties claiming under the other partner. *Card v. Moore*, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed 173 N. Y. 598, 66 N. E. 1105.

⁴⁸ *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476. See *Schloss v. Trade Co.*, 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; *De Witt v. Hastings*, 69 N. Y. 518; *Clark v. Jones*, 87 Ala. 474, 6 South. 362; *Florsheim & Co. v. Fry*, 109 Mo. App. 487, 84 S. W. 1023.

⁴⁹ *Fredenburg v. Lyon Lake M. E. Church*, supra; *Kirkpatrick v. United Presbyterian Church of Keota*, 63 Iowa, 372, 19 N. W. 272; *Trustees, etc., of M. E. Church of Newark v. Clark*, 41 Mich. 730, 3 N. W. 207.

⁵⁰ *Schloss v. Trade Co.*, supra. And see *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Capps v. Prospecting Co.*, 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; *Indianapolis F. & M. Co. v. Herkimer*, 46 Ind. 142; *Rikhoff v. Machine Co.*, 68 Ind. 388; *Dorris v. Sweeney*, 60 N. Y. 463; *Richmond Factory Ass'n v. Clarke*, 61 Me. 351. And see *Byronville Creamery Ass'n v. Ivers*, 93 Minn. 8, 100 N. W. 387.

⁵¹ In *Guckert v. Hacke*, 159 Pa. 303, 28 Atl. 249, it was held that where

that in a contract with an association it is designated by a name which is appropriate to a corporate body does not show a recognition or admission of its existence as a corporation. It merely shows an admission of the existence of an association acting under that name.⁵²

Doctrine of Estoppel is Based on Equitable Grounds.

An examination of the cases in which the doctrine of estoppel to deny corporate existence has been applied will show that most of them rest on some basis of conduct, or of benefit obtained, or other cause rendering it inequitable to allow such denial. The doctrine is an equitable one, and should be applied only where there are equitable grounds for applying it. It should never be applied where it would be inequitable to do so.⁵³ Nor should it be applied unless it would be inequitable not to do so. To say, therefore, without qualification, that a person who deals with an association as a corporation is estopped to deny its existence as a corporation, is too broad. It is perfectly right that a person who deals with an association as a corporation, knowing that it is not, should be left in the position that he has thus assumed, and be precluded from denying that the body is a corporation in actions growing out of the transaction.⁵⁴ When, however, a person deals with a body as a corporation, which the members hold out as a corporation, and which he believes to be a corporation, there should be something more than the mere fact of his dealings to estop him.⁵⁵ If, in such a case, he derives a

a person contracts with an association of persons, and becomes their creditor, without any knowledge that they claim to be a corporation instead of partners, and there is nothing to put him on inquiry, he is not estopped to sue the members as partners, and show that they have failed to comply with the law under which they claim corporate existence; and, further, that he cannot be estopped by taking their corporate note for the debt after knowledge of their claim to corporate existence, for the relation of the parties has been fixed by their status when the original contract was made. And see *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; *Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 South. 566; *Slocum v. Head*, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324. Cf. *Fitzpatrick v. Rutter*, 160 Ill. 282, 43 N. E. 392.

⁵² *Holloway v. Railroad Co.*, 23 Tex. 465, 76 Am. Dec. 68; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; *Rust Owen Lumber Co. v. Wellman*, 10 S. Dak. 89, 72 N. W. 89. But see *Jones v. Foundry Co.*, 14 Ind. 89; *Johnson Harvester Co. v. Clark*, 30 Minn. 308, 15 N. W. 252; *Richards v. Minnesota Savings Bank*, 75 Minn. 196, 77 N. W. 822.

⁵³ *Doyle v. Mizner*, 42 Mich. 332, 3 N. W. 968. And see *Estey Manuf'g Co. v. Runnels*, 55 Mich. 130, 20 N. W. 823.

⁵⁴ See *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050.

⁵⁵ *Williams v. Hewitt*, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 894.

benefit from the association, and assumes an obligation to pay therefor, as where a person borrows money or purchases goods from a pretended corporation, it is equitable that he should be estopped to deny its corporate existence in order to escape liability on his obligation.⁵⁶ On the other hand, if a person deals with a pretended corporation, believing it to be a corporation, and, instead of receiving a benefit himself, confers a benefit upon the associates, he ought not, from the mere fact that he dealt with them as a corporation, to be estopped to deny their corporate existence, and hold them individually liable. Though there are cases to the contrary,⁵⁷ there are many cases which hold that there is no estoppel under such circumstances.⁵⁸

Unlawful Assumption of Corporate Powers.

It has been said that the doctrine of estoppel does not apply, so as to prevent one who recognizes a pretended corporation by contracting with it from afterwards denying its corporate character, where the assumption of corporate powers by the body was unlawful, as being in violation of a prohibitory law, or as being for an illegal purpose. Any dealings with such a body would be illegal and void, and could not give rise to a cause of action.⁵⁹

Doctrine of Estoppel not Limited to De Facto Corporations.

This question has already been somewhat referred to.⁶⁰ In *Swartwout v. Michigan Air-Line R. Co.*,⁶¹ Judge Cooley said: "Where

⁵⁶ Ante, p. 92, and cases cited.

⁵⁷ See *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Cochran v. Arnold*, 58 Pa. 399.

⁵⁸ In *Williams v. Hewitt*, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 394, the defendants conducted a banking business as a corporation, when they were not a corporation because of noncompliance with the statute under which they pretended to organize. The plaintiff deposited money with them, believing that they were a corporation. Afterwards he brought suit against them individually as partners, to recover the amount of the deposit, and it was held that he was not estopped. And there are many cases in which a person who has sold goods to a pretended corporation has been permitted, on discovery that there was no corporation, to sue the associates as partners. *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342, 1 Cumming, Cas. Priv. Corp. 69. And see *Bigelow v. Gregory*, 73 Ill. 197; *Abbott v. Refining Co.*, 4 Neb. 416. Contra, *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Cochran v. Arnold*, 58 Pa. 399.

⁵⁹ See 1 *Thomp. Corp.* § 533; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706; *Building & Loan Ass'n of Dakota v. Chamberlain*, 4 S. D. 271, 56 N. W. 897; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.* (C. C.) 23 Fed. 233; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 15 S. W. 200, 505; *Shep. Cas. Corp.* 64. But see *Lincoln Building & Sav. Ass'n v. Graham*, 7 Neb. 173.

⁶⁰ Ante, p. 88.

⁶¹ 24 Mich. 390.

there is a corporation de facto, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the persons are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity, and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy that, in controversies between the de facto corporation and those who have entered into contract relations with it, as incorporators or otherwise, such questions should not be suffered to be raised." This dictum has been often quoted, and the doctrine of estoppel has been similarly stated by many other courts.⁶² The dictum in these cases is broad enough to imply that the doctrine of estoppel applies to de facto corporations only; but in this respect it is mere dictum, and nothing more. They do not so hold, and from other decisions of some of the same courts it seems evident that it was not intended so to hold.⁶³ There are some decisions, however, which do expressly hold that the doctrine only applies to associations that are at least corporations de facto; that it does not apply, for instance, to an association that has never had any corporate existence at all, either in law or in fact, as where persons

⁶² See the dictum in *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Butchers' & Drovers' Bank of St. Louis v. McDonald*, 130 Mass. 264, 1 Cumming, Cas. Priv. Corp. 420; *Bushnell v. Machine Co.*, 138 Ill. 67, 27 N. E. 596; *Merchants' & Manufacturers' Bank v. Stone*, 38 Mich. 779; *Merriman v. Magliveny*, 12 Helsk. (Tenn.) 494; *Eaton v. Aspinwall*, 19 N. Y. 119; *Cochran v. Arnold*, 58 Pa. 399; *Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120; *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611; *Lincoln Park Chapter v. Swatek*, 204 Ill. 228, 68 N. E. 429.

⁶³ Compare, with the above, *Cahall v. Association*, 61 Ala. 232; *Schloss v. Trade Co.*, 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; *Estey Manuf'g Co. v. Runnels*, 55 Mich. 130, 20 N. W. 823; *Stofflet v. Strome*, 101 Mich. 197, 59 N. W. 411. In *Schloss v. Trade Co.*, supra, it was said that, before a suit can be maintained by an alleged corporation, its actual or de facto existence must be proved, "or else" a state of facts shown which will estop the defendant from denying "such de facto existence." And further on it is again said that a subscriber to stock, like any other person, may be estopped from disputing "the de facto existence" of a corporation. This clearly implies that the doctrine of estoppel applies to associations which pretend to be a corporation, but which have not even a de facto existence as such. In *Estey Manuf'g Co. v. Runnels*, supra, it was said: "Where a body assumes to be a corporation, and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence. Such is the general rule founded upon equitable principles, and, if any exceptions exist, it is only where there are no facts which make it legally unjust to forbid its denial." The rule here is not limited to de facto corporations.

have attempted to organize a corporation, and have assumed to act as such, without any legislative authority at all, or under an unconstitutional law.⁶⁴ These decisions do not seem right. They confuse the doctrine relating to de facto corporations and the doctrine of estoppel, which, as we have seen, are not the same, and which are founded on different reasons. "The rule relating to corporations de facto is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization."⁶⁵ In reason, the reverse of this proposition ought to be equally true, namely, that the rule by which a person is estopped from denying the corporate character of an association which he has recognized as a corporation by dealing with it as such does not depend upon the existence of the body as a de facto corporation. There are many cases in which the rule is stated without limiting it to de facto corporations, and there are cases which expressly hold that it is not so limited; that it applies, for instance, where the law under which corporate existence is claimed is unconstitutional.⁶⁶ It was said by the su-

⁶⁴ *Heaston v. Railroad Co.*, 16 Ind. 275, 279, 79 Am. Dec. 430, 1 Cumming, Cas. Priv. Corp. 417, W. D. Smith, Cas. Corp. 20, Shep. Cas. Corp. 134; *Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415; *Harriman v. Southam*, 16 Ind. 190; *Jones v. Hardware Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562. And see *Empire Mills v. Alston Grocery Co.* (Tex. App.) 15 S. W. 505; *Boyce v. Trustees*, 46 Md. 359. The dictum in *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102, seems to support this view; but in this case it was not shown that the plaintiff contracted with the defendants as a corporation, or that he even knew that they pretended to be a corporation.

⁶⁵ *East Norway Lake Church v. Froislie*, 37 Minn. 447, 35 N. W. 260. And see *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357 (collecting cases).

⁶⁶ *Minnesota Gaslight Economizer Co. v. Denslow*, 46 Minn. 171, 48 N. W. 771; *Snyder v. Bank, Breese* (Ill.) 161; *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *Dows v. Naper*, 91 Ill. 44; *Winget v. Association*, 128 Ill. 67, 21 N. E. 12; *Building & Loan Ass'n v. Chamberlain*, 4 S. D. 271, 56 N. W. 897 (collecting cases); *Corey v. Morrill*, 61 Vt. 598, 17 Atl. 841; *Freeland v. Insurance Co.*, 94 Pa. 504; *Weinman v. Railway Co.*, 118 Pa. 192, 12 Atl. 288; *Board of Com'rs of City of St. Louis v. Shields*, 62 Mo. 247; *Broadwell v. Merritt* (Mo.) 1 S. W. 855; *Fresno Canal & Irr. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *American Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 South. 369; *Bates v. Wilson*, 14 Colo. 140, 24 Pac. 99; *Agua Fria Copper Co. v. Bashford-Burmister Co.*, 4 Ariz. 203, 35 Pac. 983; *Pape v. Bank*, 20 Kan. 440, 27 Am. Rep. 183; *Gardner v. Minneapolis & St. L. Ry. Co.*, 73 Minn. 517, 76 N. W. 282; *Orete Building & L. Ass'n v. Patz* (Neb.) 95 N. W. 793. "It is too well settled now to be controverted that a party who contracts with a corporation, whether it be by subscription to its stock, or by promissory

preme court of the United States: "Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it."⁶⁷ If the doctrine were limited to de facto corporations, it would be unnecessary. Grounds of estoppel are not necessary to prevent a private individual, whoever he may be, from attacking the existence of a de facto corporation.⁶⁸

LIABILITY OF ASSOCIATES AS PARTNERS.

45. Where persons hold themselves out as a corporation, and contract as such, without having even a de facto corporate existence, most courts hold that persons dealing with them, if not estopped to deny their corporate existence, may hold them liable as partners. Other courts held that they are not liable as partners, but that the remedy is against the agents who assume to represent the pretended corporation for breach of implied warranty of authority.

We have just seen that where persons in good faith undertake to organize themselves into a corporation under a valid law authorizing incorporation, and assume corporate powers in pursuance thereof, they constitute a corporation de facto, and, though they may not have complied with the provisions of the law in their organization, they nevertheless have the status of a corporation as against all persons except the state, and that even the state cannot attack their

note, bond, mortgage, or other form of contract, is estopped from denying the existence of the corporation." *Lehman, Durr & Co. v. Warner*, 61 Ala. 455, 466. "One who deals with a corporation as existing in fact is estopped to deny, as against the corporation, that it has been legally organized." *Close v. Cemetery*, 107 U. S. 477, 2 Sup. Ct. 267, 27 L. Ed. 408. "It is hardly possible that one will be suffered to obtain the goods of another, doing business as a corporation, and retaining the goods, defeat a recovery by alleging the illegality of the act under which the corporation was formed. We do not care to countenance such a result." *Agua Fria Copper Co. v. Bashford-Burmister Co.*, supra.

⁶⁷ *Casey v. Gall*, 94 U. S. 673, 24 L. Ed. 168, 307.

⁶⁸ Ante, p. 88.

existence as a corporation, except in a direct proceeding for that purpose. In such a case, of course, persons who deal with the body cannot dispute its corporate existence, and hold the associates liable as partners.⁶⁹

We have also seen that, by the weight of authority, even where there is not even a de facto corporation, persons who deal with a pretended corporation as a corporation will, except under peculiar circumstances, be estopped to deny its existence as a corporation, for the purpose of holding the associates liable as partners.⁷⁰

The question now arises as to the remedy of those who deal with an association which is not even a de facto corporation, and under such circumstances that they are not estopped to deny its corporate existence, as where they deal with the parties in ignorance of their claim of corporate existence. On this question the courts do not agree. In some jurisdictions it is held that persons who contract as a corporation, without a right to do so, cannot be held liable as partners, since they have not contemplated or assented to such a liability. Fay v. Noble⁷¹ is a leading case holding this view. In this case the agent of an association which pretended to be a corporation, but which had not been legally organized, borrowed money from the plaintiffs in the name of the association, and gave its note therefor. The plaintiffs sought to recover the money in an action against the associates as partners, but it was held that they could not recover.⁷² There are many other cases to the same effect, though in most of them it will be found that the plaintiff contracted with the association as a corporation, so that he might have been held estopped.⁷³

⁶⁹ Ante, p. 78; *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. 362, Shep. Cas. Corp. 275; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668.

⁷⁰ Ante, p. 91; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Cochran v. Arnold*, 58 Pa. 399.

⁷¹ 7 Cush. (Mass.) 188, 1 Cumming, Cas. Priv. Corp. 420.

⁷² But if a single person assumes, without right, to act and contract as a corporation, his pretended associates being associates in name only, and gives a note in the name of the pretended corporation, he can be sued individually on the note. *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342, 1 Cumming, Cas. Priv. Corp. 69.

⁷³ *Rutherford v. Hill*, 22 Or. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. Rep. 596; *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83; *Salem First Nat. Bank v. Almy*, 117 Mass. 476; *Ward v. Brigham*, 127 Mass. 24; *Medill v. Collier*, 16 Ohio St. 599; *Humphreys v. Mooney*, 5 Colo. 282; *Planters' & Miners' Bank v. Padgett*, 69 Ga. 159; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Blanchard v. Kaull*, 44 Cal. 440; *Gartside Coal Co. v. Maxwell* (C. C.) 22 Fed. 197.

According to this doctrine, if there is not even a de facto corporation, and the party contracting with the pretended corporation is not estopped to deny its corporate existence, the remedy is against the agent or agents who entered into the contract on behalf of the pretended corporation for breach of implied warranty of authority.

"By professing to act for a corporation which does not exist, they put themselves in the position of a person who professes to act as the agent of another person who is really non-existent. Under a well-settled rule, they are therefore personally bound to make good any undertaking which they assume in that character."⁷⁴

In most of the states, perhaps, this rule is not recognized; but it is held that where a pretended corporation is not a corporation de facto, and where persons dealing with it are not, under the rules heretofore explained,⁷⁵ estopped to deny its corporate existence,—as, where they do not know of its claim to corporate existence, or even where they do know of it, if in the particular jurisdiction they are not held to be estopped,—they may hold the associates liable as partners for debts contracted by them in the name of the association.⁷⁶ In some states this rule is, in effect, expressly declared by statute.⁷⁷

⁷⁴ 1 Thomp. Corp. § 418, citing *Medill v. Collier*, 16 Ohio St. 599; *Fay v. Noble*, 7 Cush. (Mass.) 188, 1 Cumming, Cas. Priv. Corp. 420. Where the officers of a corporation executed a lease before it was authorized to transact business, although it was a corporation de jure, the directors and stockholders were not liable as partners; but the officers were liable on the implied warranty of their authority to act on behalf of the corporation, where they were aware of their want of authority, while the lessor was not. *Seeburger v. McCormick*, 178 Ill. 404, 53 N. E. 840.

⁷⁵ Ante, p. 91.

⁷⁶ *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *Guckert v. Hacke*, 159 Pa. 303, 28 Atl. 249; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 15 S. W. 200, 505, *Shep. Cas. Corp.* 64; *Kaiser v. Bank*, 58 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85, *Shep. Cas. Corp.* 268; *Pettis v. Atkins*, 60 Ill. 454; *Bigelow v. Gregory*, 73 Ill. 197; *Whipple v. Parker*, 29 Mich. 380; *Elliot v. Hilmrod*, 108 Pa. 569; *Garnett v. Richardson*, 35 Ark. 144; *Hill v. Beach*, 12 N. J. Eq. 31; *Abbott v. Refining Co.*, 4 Neb. 416; *Wechselberg v. Bank*, 12 C. C. A. 58, 64 Fed. 90, 26 L. R. A. 470; *Coleman v. Coleman*, 78 Ind. 346; *Martin v. Fewell*, 79 Mo. 401, *Shep. Cas. Corp.* 271; *Smith v. Warden*, 86 Mo. 382; *Williams v. Hewitt*, 47 La. Ann. 1076, 17 South. 497, 49 Am. St. Rep. 394; *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; *New York Nat. Exch. Bank v. Crowell*, 177 Pa. 313, 35 Atl. 613; *Bergeron v. Hobbs*, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85. In *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220, it was held that the associates in a defectively incorporated association could sue as partners.

⁷⁷ Post, p. 550. See *Clegg v. Hamilton & Wright County Grange Co.*, 61 Iowa, 121, 15 N. W. 865; *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99.

Still other courts, with what appears to be the better reason, hold that the associates in such cases are liable, not upon the ground of partnership, but upon the ordinary principle of agency and contract,—in other words, that they are liable upon contracts which they have expressly or impliedly authorized or ratified.⁷⁸

⁷⁸ *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; *Roberts Mfg. Co. v. Schlick*, 62 Minn. 332, 64 N. W. 826. In *Johnson v. Corser*, *supra*, where several persons had entered into articles of association, with the intention of becoming incorporated, but failed to perfect an incorporation, it was held that they were individually liable on a contract which they were found to have authorized or ratified, although it was in terms the contract of the assumed corporation, but that, the purposes of the association being to secure the grading and extension of a public street, and not for gain or profit, the prosecution of the contemplated work by the association did not constitute the association a partnership, nor the associates copartners, with authority (implied from their relations) in each member to bind all the associates by any act within the scope of the business undertaken.

CHAPTER IV.

RELATION BETWEEN CORPORATION AND ITS PROMOTERS.

- 46. Liability of Corporation for Expenses and Services of Promoters.
- 47. Liability on Contracts by Promoters.
- 48. Liability of Promoters to Corporation and Stockholders.

LIABILITY OF CORPORATION FOR EXPENSES AND SERVICES OF PROMOTERS.

46. Some courts imply a promise by a corporation to pay for expenses necessarily incurred and services necessarily rendered by promoters, which inure to the benefit of the corporation; but by the better opinion, in the absence of express provision in the charter or some statute, there is no such liability unless the corporation, after organization, expressly promises to pay.

Corporations are sometimes made liable by the express provisions of their charter, or by statute, for necessary expenses incurred or services rendered in their promotion. As to the liability in the absence of such provision, there is some difference of opinion. A few courts have held that a corporation is liable at law, upon an implied assumpsit, for expenses legitimately incurred and services legitimately rendered by promoters before its organization, which were necessary to perfect organization, on the ground that, in accepting the benefit of such expenses and services, it becomes bound to pay therefor, and that no express promise to pay need be shown.¹ The generally accepted doctrine, however, is that the corporation is not liable, unless made so by statute or by its charter, in the absence of an express promise to pay.² Such a promise is supported by a sufficient consideration, and is binding.

If money is paid by subscribers to promoters preliminary to organization, and the promoters or provisional directors fail to or-

¹ Low v. Railroad Co., 45 N. H. 370, 46 N. H. 284; Hall v. Railroad Co., 28 Vt. 401. In these cases a corporation was held liable for services in procuring subscriptions to its capital stock, necessary in order to perfect organization. But in the case last cited charges by promoters for services in procuring an act of incorporation were disallowed, on the ground that the services must be regarded as voluntarily rendered, and there was no promise by the corporation.

² Rockford, R. I. & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; New York & N. H. R. Co. v. Ketchum, 27 Conn. 170; Marchand v. Association, 26 La. Ann. 389; Melhado v. Railway Co., L. R. 9 Q. P. 503; Security Co. v. Bennington Battle Monument Ass'n, 70 Vt. 201, 40 Atl. 43. See, also, Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50.

ganize according to the prospectus, and abandon the enterprise, after applying the money in payment of expenses in view of organization, the subscribers cannot be made to bear such expenses, and they may recover the money paid by them in an action for money had and received.³

LIABILITY ON CONTRACTS BY PROMOTERS.

47. With regard to the liabilities arising out of contracts entered into by promoters on behalf of a corporation the following rules are established by the weight of authority:

- (a) The promoters are personally liable unless exempt by the terms of the contract.**
- (b) The corporation is not liable unless it has expressly or impliedly adopted the contract after its organization.**
- (c) In Massachusetts it is held that the corporation cannot become a party to the contract even by adoption. But, by the weight of authority, the contract may be adopted by the corporation, and thereby become binding upon it and in its favor.**
- (d) Adoption of the contract is not a ratification, but it is, in effect, the making of a new contract by the corporation, which is to be regarded as made at the date of the adoption.**
- (e) Adoption by the corporation will be implied if it knowingly accepts the benefits of the contract.**

A corporation is not liable on contracts made by its promoters, unless it has adopted them. A promoter, though he may assume to act on behalf of the projected corporation, and not for himself, cannot be treated as an agent of the corporation, for it is not yet in existence; and therefore, when there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced either by or against the corporation.⁴ This is so though the promoters

³ *Nockels v. Crosby*, 3 Barn. & C. 814; *Walstab v. Spottiswoode*, 15 Mees. & W. 501.

⁴ 2 Cook, *Stock, Stockh. & Corp. Law*, § 707; *Weatherford, M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, *Shep. Cas. Corp.* 33; *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59; *Munson v. Railway Co.*, 103 N. Y. 58, 8 N. E. 355; *Carmody v. Powers*, 60 Mich. 26, 26 N. W. 801; *Tift v. Bank*, 141 Pa. St. 550, 21 Atl. 660; *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776; *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22; *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193; *Western Screw & Manuf'g Co. v. Cousley*, 72 Ill. 531; *Gent v. Insurance Co.*, 107 Ill. 652; *Carey v. Mining Co.*, 81 Iowa, 674, 47 N. W. 882; *Morrison v. Mining Co.*, 52 Cal. 306; *Hawkins v. Mining Co.*, Id. 513; *Ireland v. Globe Milling & R. Co.*, 20 R. I. 190, 38 Atl. 116, 38 L. R. A. 299; *Park v. Modern Woodmen of America*, 181 Ill. 214, 54 N. E. 932; *Church v. Church Cement Co.*, 75 Minn. 85, 77 N. W. 548. And see *Chicago Bldg. & Mfg. Co. v. Talboton Creamery & Mfg. Co.*, 106 Ga. 84, 31

become, at the creation of the corporation, its only stockholders, directors, and officers.⁵ The promoters themselves are personally liable on such contracts, unless the other party agreed to look to some other fund for payment;⁶ and this is the party's only remedy if the corporation, after its organization, has done nothing to bind itself under the principles hereafter explained.

In Massachusetts it is held that, if a contract is made in the name and for the benefit of a projected corporation by its promoters, the corporation cannot become a party to the contract after organization, even by adoption of it.⁷ And it has been so held in some of the English cases.⁸ Most of the courts hold, however, that contracts made by promoters on behalf of a projected corporation, if within the scope of its general powers, may be adopted by the corporation after its organization, and thus become binding upon it, and binding in its favor on the other party.⁹ It is sometimes said that such contracts may be ratified by the corporation,^{*} but this is

S. E. 809; *Martin v. Remington-Martin Co.*, 88 N. Y. Supp. 573, 95 App. Div. 18.

⁵ *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327.

⁶ *Carmody v. Powers*, 60 Mich. 26, 26 N. W. 801; *Roberts Manuf'g Co. v. Schlick*, 62 Minn. 332, 64 N. W. 826; *Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 854. But see *Durgan v. Smith*, 133 Mich. 331, 94 N. W. 1044. As to the personal liability of promoters on contracts, see article by Henry O. Taylor, Esq., in 16 Am. Law Rev. 281.

⁷ *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am St. Rep. 193. Cf. *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22.

⁸ *Kelner v. Baxter*, L. R. 2 C. P. 174; *Gunn v. Insurance Co.*, 12 C. B (N. S.) 694; *Melhado v. Railway Co.*, L. R. 9 C. P. 503; *In re Empress Engineering Co.*, 16 Ch. Div. 125; *In re Northumberland Hotel Co.*, 33 Ch. Div. 16; *Spiller v. Skating Rink Co.*, 7 Ch. Div. 368.

⁹ *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327; *Frankfort & S. T. Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776; *Pittsburg & T. Copper Co. v. Quintrell*, 91 Tenn. 693, 20 S. W. 248; *Grape Sugar & V. Manuf'g Co. v. Small*, 40 Md. 395; *Stanton v. Railway Co.*, 59 Conn. 272, 22 Atl. 800, 21 Am. St. Rep. 110; *Little Rock & Ft. S. Ry. Co. v. Perry*, 37 Ark. 164; *Schreyer v. Mills Co.*, 29 Or. 1, 43 Pac. 719; *Bommer v. Manufacturing Co.*, 81 N. Y. 468; *Scadden Flat Gold-Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440. See *Spiller v. Skating Rink Co.*, 7 Ch. Div. 368; *Mason v. Harris*, L. R. 11 Ch. Div. 97; 1 *Cumming, Cas. Priv. Corp.* 731; *Howard v. Patent Ivory Co.*, 38 Ch. D. 156.

^{*} In *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544, where a promoter of defendant corporation contracted with plaintiff on behalf of the corporation, before it came into existence, to pay him for services to be rendered to it, and after the incorporation the promoter ratified the contract as president, the contract being one which would have bound the corporation if made by the president, it was held that it was bound by the contract by ratification. See, also, *Whitney v. Wyman*, 101 U. S. 393, 25 L. Ed. 1050.

inaccurate, for ratification presupposes a principal existing at the time of the agent's action, whereas the corporation is not in existence at the time the contract is entered into by the promoter.¹⁰ The liability in case of adoption does not rest upon the idea of any supposed agency of the promoters, but upon the immediate and voluntary act of the company.¹¹ There is no difference between the making of a contract by a corporation by adoption of an agreement originally made in advance for it by promoters, and the making of an entirely new contract. No greater formality is required in the one case than in the other; and if it could make an entirely new contract without the use of its seal, or without writing, or without formal action of its board of directors, it may also so adopt an agreement made for it by its promoters. And it is not necessary that adoption of the agreement be express. It may be shown from acts or acquiescence of the corporation or its authorized agents, as any similar contract might be shown.¹² The contract in case of adoption is to be regarded as made by the corporation as of the date of the adoption, and not the date of the agreement by the promoter, and therefore a contract made by a promoter, and adopted by the corporation, is not within the statute of frauds, as not to be performed within a year, if it is to be performed within a year from such adoption, though not within a year from the date of the promoter's agreement.¹³

If a contract is made on behalf of a corporation by its promoters, and the corporation after its organization, and with knowledge of the facts, accepts its benefits, it must take them cum onere; and, if the contract has been performed by the other party, it may be enforced against the corporation. By accepting the benefits of the contract, the corporation adopts the contract.¹⁴ Thus, where a prop-

¹⁰ *Weatherford, M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, *Shep. Cas. Corp.* 33; *McArthur v. Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653. Cf. *Stanton v. Railway Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110.

¹¹ *Pittsburg & T. Copper Co. v. Quintrell*, 91 Tenn. 693, 20 S. W. 243; *Badger Paper Co. v. Rose*, 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162.

¹² *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327; *Burden v. Burden*, 8 App. Div. 160, 40 N. Y. Supp. 499; *Schreyer v. Mills Co.*, 29 Or. 1, 43 Pac. 719.

¹³ *McArthur v. Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

¹⁴ *Weatherford, M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, *Shep. Cas. Corp.* 33; *Id.* (Tex. Civ. App.) 22 S. W. 70; *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327; *Moore & H. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 28; *Paxton Oattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852; *Grape Sugar & V. Manuf'g Co. v. Small*, 40 Md. 395; *Little Rock & Ft. S. Ry. Co. v. Perry*, 37 Ark. 164; *Schreyer v. Mill Co.*

osition was made on behalf of a railroad company by its promoters, that, if a bonus should be subscribed and paid to it, it would build a road between certain points, and would carry coal at a stipulated rate, it was held that the corporation, by accepting the bonus after its organization, adopted the contract, and was bound to fulfill the stipulations.¹⁵ In a Nebraska case, after articles of incorporation had been drawn up and signed by the promoters of a cattle company, but before they were filed, and before the time fixed in the articles for the commencement of business, a president was selected for the corporation by the promoters, and he, in their presence and with their approval, executed and delivered to a third person a note, purporting to be the note of the corporation, in payment for and in consideration of the sale and delivery of certain horses and cattle and a ranch and other property to the corporation. After the corporation was fully organized, and the time had arrived when it was authorized to commence business, the property came into its possession, and it continued to use and enjoy the same. It was held that this was an adoption of the note by the corporation, and that it was liable thereon.¹⁶

Where the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on the part of the other party to the agreement, like the offer in a subscription to the stock of a corporation to be formed in the future, and may be accepted and adopted by the corporation after its organization; and the exercise of any right inconsistent with the nonexistence of such contract ought to be deemed conclusive evidence of such acceptance or adoption, provided, of course, the corporation has knowledge of the facts.¹⁷

A distinction has been drawn, with respect to the rule that a corporation which accepts the benefits of a contract made by its promoters takes it cum onere, between a promise made on behalf of

29 Or. 1, 43 Pac. 719. And see *Rogers v. Land Co.*, 184 N. Y. 197, 32 N. E. 27; *Grand River Bridge Co. v. Rollins*, 13 Colo. 4, 21 Pac. 897; *Davis v. Valley Electric Light Co.* (Sup.) 61 N. Y. Supp. 580; *Kaeppler v. Redfield Creamery Co.*, 12 S. D. 483, 81 N. W. 907. Cf. *Bell's Gap R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39, where the corporation was held not to be liable for services performed under an agreement with less than a majority of its promoters. And see, to the same effect, *Tift v. Bank*, 141 Pa. 550, 21 Atl. 660.

¹⁵ *Weatherford, M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, Shep. Cas. Corp. 33.

¹⁶ *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852.

¹⁷ *Weatherford, M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, Shep. Cas. Corp. 33.

the corporation in the contract itself, the benefits of which the corporation has accepted, and a promise in a previous contract to pay for services in procuring the latter to be made; and it was held by the Texas supreme court that, while a corporation accepting a bonus contracted for by its promoters was bound by the stipulations in consideration of which the bonus was subscribed, it was not bound, by reason of its acceptance of the bonus, by a contract made by its promoters to pay a man for services in procuring subscribers to the bonus, since the latter contract was no part of the contract the benefits of which it accepted.¹⁸

To make a corporation liable for services performed under a contract with its promoters before its organization, the services must have been intended at the time to inure to the benefit of the future corporation, and must have been rendered in its behalf, and with the expectation that it would be bound. It will not be liable if they were rendered on the credit of the promoters individually.¹⁹

LIABILITY OF PROMOTERS TO CORPORATION AND STOCK-HOLDERS.

48. Promoters, when acting for a projected corporation, occupy towards it a fiduciary relation, and for any secret profits made by them in transactions entered into on behalf of the corporation they may be compelled to account.

It is well settled that the promoters of a projected corporation occupy a fiduciary relation towards it, similar to that of an agent to a principal; and they have no right, in negotiations on behalf of the corporation, to derive any advantage over other stockholders without a full and fair disclosure of the transaction. Any secret profits made by them while acting for the corporation they must refund to it. The fact that there is no fraudulent intent on their part does not relieve them. Because of their position, the law forbids them secretly to derive any advantage over other stockholders, and makes them accountable for any profits realized by them.²⁰ And they may

¹⁸ *Weatherford, M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, Shep. Cas. Corp. 33, reversing Id. (Tex. Civ. App.) 23 S. W. 425.

¹⁹ *Perry v. Railway Co.*, 44 Ark. 383. And see *Davis v. Creamery Co.*, 48 Neb. 471, 67 N. W. 436; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471, 67 N. W. 436; *Tryber v. Girard Creamery & Cold Storage Co.*, 67 Kan. 489, 73 Pac. 83.

²⁰ *Chandler v. Bacon (C. C.)* 30 Fed. 538; *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78, 35 Atl. 436; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1004; *Pittsburg Min. Co. v. Spooner*, 74

be made to account in a suit by the corporation itself or its assignee or receiver;²¹ or the other stockholders may individually maintain an action for their proportion of such profits,²² or they may sue for damages in case of fraud.²³ A promoter, for instance, cannot purchase property, acting for the corporation, and then sell it to the corporation at an advance; nor can he negotiate a sale of property to the corporation, and secretly receive from the vendor a commission or bonus. In either case he will be compelled to account for the profits which he has realized.²⁴ In *Pittsburg Min. Co. v. Spooner*,²⁵ a com-

Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149; *Simons v. Mining Co.*, 61 Pa. 202, 100 Am. Dec. 628; *McElhenny's Appeal*, 61 Pa. 188; *Short v. Stevenson*, 63 Pa. 95; *Emery v. Parrott*, 107 Mass. 95; *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876; *Getty v. Devlin*, 54 N. Y. 403; *Yale Gas-Stove Co. v. Wilcox*, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159; *Hichens v. Congreve*, 4 Russ. 562; *Bagnall v. Carlton*, 6 Ch. Div. 371; *Emma Silver Min. Co. v. Grant*, 11 Ch. Div. 918; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Gover's Case*, L. R. 20 Eq. 122; *Erlanger v. Phosphate Co.*, 3 App. Cas. 1218; *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951; *Hebgen v. Koeffler*, 97 Wis. 313, 72 N. W. 745. See, also, *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; *Hayden v. Green*, 66 Kan. 204, 71 Pac. 236; *In re Olympia* [1898] 2 Ch. D. 153. Parties who act as agents for a corporation in acquiring property for it cannot make a profit out of the transaction; nor can they do so if they assume to act without precedent authority, if their transactions are accepted as the acts of agents by the corporation; and if, with a view to creating a corporation, persons represent themselves as acting for the company to be formed, and propose to sell at the prices they pay, and their purchases are taken on such representations, and stockholders invest thereon, it is a fraud on the company and interested parties to allow such agents to retain profits paid them in ignorance of the true sums actually advanced in making purchases. *Simons v. Mining Co.*, supra.

²¹ *Pittsburg Min. Co. v. Spooner*, supra; *Chandler v. Bacon*, supra.

²² *Emery v. Parrott*, supra; *Getty v. Devlin*, supra.

²³ *Getty v. Devlin*, supra.

²⁴ See the cases cited above. Promoters of a corporation, subsequently to its creation, and while they were its sole stockholders, voted to issue stock to themselves in payment for services in securing options on land, which they assigned to the corporation; this stock equaling the estimated profits to be derived from the options. Afterwards the promoters invited the public to subscribe for the stock, without disclosing the facts as to such stock, or getting their consent to the payment of such remuneration. It was held that they were guilty of fraud, and that the company could, without returning the lands acquired under the options, maintain an action for recovery of the stock, or damages for the loss thereof. Said the court: "Payment to promoters of remuneration for their services is not made valid by a vote passed by the corporation, when the corporation is in the sole control of the promoters, before the capital has been issued to the public. The persons

²⁵ 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149.

plaint by a corporation for money alleged to have been received by the defendants to its use alleged, in substance, that the defendants, having obtained the right to purchase a certain mining option for \$20,000, proceeded to form the plaintiff corporation to make such purchase, representing to the persons who subscribed for stock that the option would cost \$90,000; and that, having first induced third persons to subscribe for the stock upon such representations, and to pay the corporation \$100,000 for their stock, the defendants then, as officers of the plaintiff corporation, purchased the option for it nominally for \$90,000, paying the \$20,000 which it actually cost them, with the money received from the sale of stock, and converting the remaining \$70,000 to their own use. It was held that the complaint stated a good cause of action in favor of the corporation.

This fiduciary relation exists between the promoter of a corporation and the corporation only where he is acting for the corporation. There is no rule of law which prevents a person who owns property, though purchased by him for the purpose, from promoting a corporation and selling the property to the corporation after it is organized. In such a case, in the absence of fraud, and if he is not acting also for the corporation, he may sell at such a price as he may be able to obtain from the board of directors, without regard to the original cost to him.²⁶ Yet if, at the time he sells, he occupies the position of a promoter, he is bound to deal openly, and in such a way that those having independent charge of the company, as well as those who are induced to become subscribers to the stock, may be fairly advised of the relation he bears to the property which he proposes to sell, in like manner as one who assumes to act as agent of another in the

to whom the promoters owe the duty which they owe by reason of the fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters; that is to say, the future stockholders." *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725. And see *East Tennessee Land Co. v. Leeson*, 183 Mass. 37, 66 N. E. 427; *Lagunes Nitrate Co. v. Lagunes Nitrate Syndicate* [1899] 2 Ch. 392; *Pietsch v. Milbrath*, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 68 L. R. A. 945, 107 Am. St. Rep. 1017. But see *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254.

²⁶ *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Lungren v. Pennell* (Pa. Sup.) 10 Wkly. Notes Cas. 297; *Ladywell Min. Co. v. Brookes*, 34 Ch. Div. 398; *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876; dictum in *Foss v. Harbottle*, 2 Hare, 461, 1 Cumming, Cas. Priv. Corp. 693; *Milwaukee Cold-Storage Co. v. Dexter*, 99 Wis. 214, 74 N. W. 976, 40 L. R. A. 837; *Spaulding v. North Milwaukee Town-Site Co.*, 106 Wis. 481, 81 N. W. 1064; *Richardson v. Graham*, 45 W. Va. 134, 80 S. E. 92. Cf. *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 82 Pac. 600.

purchase of property.* If the promoters who are selling property to a corporation are also the directors of the corporation, so that they also purchase for it, it is a case of the officers and agents of an existing corporation purchasing property for the corporation from themselves, and the most perfect good faith is required.²⁷

To constitute a person a promoter of a projected corporation, so as to bring him within the operation of this rule, it must affirmatively appear that he was acting for and in behalf of the proposed corporation, or that he assumed to so act.²⁸

*Yelser v. United States Board & P. Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Central Trust Co. v. East Tennessee Land Co. (C. C.) 116 Fed. 743; Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Old Dominion Copper M. & S. Co. v. Bigelow, 188 Mass. 815, 74 N. E. 653, 108 Am. St. Rep. 479; Yale Gas-Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159; Colton Imp. Co. v. Richter, 26 Misc. Rep. 26, 55 N. Y. Supp. 486; Gluckstein v. Barnes [1900] App. Cas. 240; In re Leeds & Hanley Theatres of Varieties [1902] 2 Ch. 809. There is no duty imposed on the promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company. Erlanger v. New Sombrero Phosphate Co., 48 Law J. Ch. 73, 3 App. Cas. 1218, distinguished. Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate [1899] 2 Ch. 392.

²⁷ Post, p. 494.

²⁸ St. Louis, Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 608, 15 Pac. 544; Goodwin v. Wilbur, 104 Ill. App. 45. One who engages with the owner of land in organizing a corporation to purchase it, by procuring subscriptions, and who frames the prospectus and becomes one of the first subscribers, is a promoter of the corporation. Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 35 Atl. 436, 48 Atl. 671; Id. (N. J. Err. & App.) And see other cases cited in note 18, *supra*.

CHAPTER V.

POWERS AND LIABILITIES OF CORPORATIONS.

- 49. In General.
- 50. Express Powers.
- 51. Powers Incidental to Corporate Existence.
- 52. Powers Implied from Powers Expressly Granted.
- 53. Construction of Charters—In General.
- 54. Power to Take and Hold Real and Personal Property.
- 55. Power to Act as Trustee.
- 56-57. Powers as to Contracts and Conveyances.
- 58-61. Form and Mode of Corporate Contracts.

IN GENERAL.

- 49. A corporation has such powers, and such powers only, as are conferred upon it by its charter. Powers may be conferred upon a corporation**
- (a) Expressly.**
 - (b) Impliedly, because they are incidental to corporate existence.**
 - (c) Impliedly, because they are necessary or proper in order to exercise the powers expressly conferred.**

A corporation, being a mere creature of the legislature, has such powers only as are conferred upon it by its charter. But it is not necessary that all powers, in order to exist, shall be conferred in express terms. It has, of course, all powers, expressly conferred, provided the legislature was not prevented from conferring them by some constitutional limitation. In addition to this, many powers are impliedly conferred or attach as being incidental to corporate existence, though not expressly mentioned in the charter. Again, the charter impliedly confers all powers, though not expressly mentioned, which are reasonably necessary and proper for the execution of the powers that are expressly conferred. "Corporations are creatures of the legislature, having no other powers than such as are given them by their charters, and such as are incidental or necessary to carry into effect the purposes for which they were established."¹

¹ *Downing v. Road Co.*, 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148, W. D. Smith, Cas. Corp. 129, *Shep. Cas. Corp.* 75; *Colman v. Railway Co.*, 10 Beav. 1, 1 Cumming, Cas. Priv. Corp. 136; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, 1 Cumming, Cas. Priv. Corp. 164, W. D. Smith, Cas. Corp. 132, *Shep. Cas. Corp.* 70; *Byrne v. Manufacturing Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; *State v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R.

The rule in England is that a corporation has the same power to contract and act as a natural person has, except in so far as it may be restricted by its charter, expressly or impliedly. But it is also held that, when a corporation is created for a particular purpose, the act creating it impliedly prohibits it from exercising any powers not necessary or proper to carry out that purpose. It was said by Blackburn, J., in *Ashbury Railway Carriage & Iron Co. v. Riche*:² "I take it that the true rule of law is that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, as a natural person has. And this is important when we come to construe the statutes creating a corporation, for if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to prohibit, and so avoid, the making of a contract of this particular kind?"³

In this country the general doctrine is that corporations organized under acts of the legislature have such powers, and such powers only, as are conferred, expressly or impliedly, by the acts. In *Thomas v. West Jersey R. Co.*⁴ it was insisted that a corporation "may do any act which is not either expressly or impliedly prohibited by its charter, although, where the act is unauthorized by the charter, a shareholder may enjoin its execution, and the state may, by proper process, forfeit the charter." The court, however, did not take this view, but said: "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is ex-

A. 725, 63 Am. St. Rep. 303; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; *Bankers' Union of the World v. Crawford*, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465; *Cumberland Tel. & Tel. Co. v. City of Evansville (C. C.)* 127 Fed. 187.

² L. R. 9 Exch. 224, 2 Cumming, Cas. Priv. Corp. 34.

³ *South Yorkshire Ry. & River Dun Co. v. Great Northern Ry. Co.*, 9 Exch. 84.

⁴ 101 U. S. 71, 25 L. Ed. 950, 1 Cumming, Cas. Priv. Corp. 164.

pressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

EXPRESS POWERS.

50. A corporation has all powers expressly conferred upon it by its charter, unless conferred in violation of constitutional limitations.

Of the powers expressly conferred upon a corporation, there is little to be said. The questions which arise in this connection are chiefly questions of construction. The legislature has the absolute power to confer upon a corporation any power it may see fit to confer, so long as it does not violate any limitation contained in the state or federal constitution. A grant of powers in violation of constitutional limitations can have no effect.

POWERS INCIDENTAL TO CORPORATE EXISTENCE.

51. Certain powers are incidental to corporate existence, and are impliedly conferred upon every corporation unless there is something to show an intention to exclude them. These powers are:

- (a) To have perpetual or continuous succession during the period for which it is created.**
- (b) To have a corporate name, and to contract, to grant and receive, and to sue and be sued thereby.**
- (c) To purchase and hold real and personal property for purposes authorized by its charter.**
- (d) To have a common seal.**
- (e) To make by-laws for its government.**
- (f) The power of motion or removal of members. But this power is not incident to a joint-stock corporation.⁵**

Some of the powers above mentioned, as has been seen,⁶ are essential to corporate existence, while others are incidental, but not essential, and may be withheld.

As we have seen in a former chapter, the power of perpetual succession, or succession during the period for which it is created, is not only an incident which attaches to every corporation, but is essential to corporate existence. A corporation, therefore, has the implied power to elect members in the place of those who are removed by death or otherwise.⁷

⁵ 2 Kent, Comm. 277, 278.

⁶ Ante, p. 11.

⁷ 1 Bl. Comm. 475.

So with the power to have a corporate name, and to contract obligations, receive and grant, and sue and be sued thereby. This power attaches as incidental to corporate existence. The power to contract is restricted to purposes authorized by the charter.⁸

The power to purchase and hold real or personal property is incidental to corporations, but not essential. This power, like the power to contract, is limited to purposes authorized by the charter.⁹

The power to have a common seal, though not essential to corporate existence, is an incident which attaches to every corporation without express provision. The necessity to use a seal will be considered in another place.¹⁰

Every corporation has the implied power to make by-laws for its government, but this power is not essential. It may be dispensed with if the charter sufficiently provides for the government of the body. This power will be considered at length in a subsequent chapter.¹¹

The power of motion, or removal of members, is said to be incident to corporations; and this is true of many corporations, like boards of trade, and other non-stock corporations; but no such power is incident to modern joint-stock corporations. This power will be further discussed in treating of the relation between the corporation and its members.¹²

POWERS IMPLIED FROM POWERS EXPRESSLY GRANTED.

52. All powers that are reasonably necessary or proper for the execution of the powers expressly granted, and that are not expressly or impliedly excluded, are impliedly conferred.

Corporations not only have the powers expressly granted by the charter, and the particular powers which have been mentioned as incidental to corporate existence, but, in addition, they have all powers that are reasonably necessary or proper for the execution of the powers that are expressly granted, provided such powers are not withheld.

⁸ Ante, pp. 15, 63; post, pp. 124, 153.

⁹ Post, p. 119.

¹⁰ Post, p. 154.

¹¹ Post, p. 440.

¹² Post, p. 389.

CONSTRUCTION OF CHARTERS—IN GENERAL.

53. In the construction of charters the intention of the legislature must be ascertained, and must govern. The rules are substantially the same as in the case of other statutes. The following rules may be particularly mentioned:

- (a) In cases of doubt, charters are to be construed most strongly in favor of the public, and against the corporation.**
- (b) Where general words follow an enumeration of persons or things by words of particular and specific meaning, such general words are not to be construed in their widest sense, unless such seems clearly to have been the intention of the legislature, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.**
- (c) If a charter expressly enumerates certain powers, this impliedly excludes all other powers except those mentioned, and such as may be necessary or proper to the execution of them.**

When a corporation is formed under a special act, its powers are generally specified in the act, and the act, together with any other laws which are binding upon it, constitute its charter. When a corporation is formed under a general law, this law, together with the articles of association required by the law to be executed and filed by the incorporators, and any other laws of the state which are applicable to such corporations, constitute its charter.¹³

Construction in Favor of the Public in Case of Doubt.

In the construction of contracts between individuals it is a rule that the language must be taken most favorably, in case of doubt, against the party using it. The rule for construing corporate charters, at least if they grant exclusive privileges or extraordinary franchises, is different. It has often been held that charters secured under special legislative grants will, in case of doubt, be construed most strongly against the grantees and in favor of the public. As was said by an English judge: "The language of these acts * * * is to be treated as the language of the promoter's of them. They ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public."¹⁴ The same rule

¹³ *Lincoln Shoe Manuf'g Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480; *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; *Sturdevant Bros. Co. v. Farmers' & M. Bank*, 69 Neb. 220, 95 N. W. 819.

¹⁴ *Parker v. Railway Co.*, 7 Man. & G. 288. And see, *State v. Payne*, 129 Mo. 468, 31 S. W. 797, 33 L. R. A. 576; *Stourbridge Canal Co. v. Wheeley*,

applies to the construction of the charters of corporations formed under general laws. "In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation, and in favor of the public."¹⁵

The rule of strict construction applies to grants of exclusive privileges,¹⁶ to exemptions,¹⁷ and generally to all grants of powers in derogation of common right.¹⁸ "If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation."¹⁹ Powers and privileges in derogation of common right, or such as are not common

2 Barn. & Adol. 792, 1 Cumming. Cas. Priv. Corp. 298; *The Binghamton Bridge*, 3 Wall. (U. S.) 51, 18 L. Ed. 137; *Parrot v. Lawrence*, 2 Dill. 332, Fed. Cas. No. 10,772; *Mills v. County of St. Clair*, 8 How. (U. S.) 569, 12 L. Ed. 1201; *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *First M. E. Church v. Dixon*, 178 Ill. 260, 52 N. E. 887.

¹⁵ *Black v. Canal Co.*, 24 N. J. Eq. 474; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 26, 9 Sup. Ct. 409, 32 L. Ed. 837; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Ross-Meehan B. S. F. Co. v. Southern M. Iron Co. (C. C.)* 72 Fed. 957. "By a familiar rule, every public grant of property, or privileges, or franchises, if ambiguous, is to be construed against the grantee and in favor of the public, because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority." *Central Transportation Co. v. Pullman Car Co.*, *supra*.

¹⁶ *Charles River Bridge v. Warren Bridge Co.*, 11 Pet. (U. S.) 420, 9 L. Ed. 773, 938, 1 Cummings, Cas. Priv. Corp. 506; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; *Indianapolis Cable R. Co. v. Citizens R. Co.* 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; *Clarksville & R. Turnpike Co. v. Montgomery Co.*, 100 Tenn. 417, 45 S. W. 345, 58 L. R. A. 155.

¹⁷ *Lincoln St. Ry. Co. v. City of Lincoln*, 61 Neb. 109, 84 N. W. 802. As to grant of exemption from taxation, *post*, p. 225.

¹⁸ *Northwestern Fertilizer Co. v. Village of Hyde Park*, 97 U. S. 659, 24 L. Ed. 1086; *Bly v. White Deer M. Water Co.*, 197 Pa. 80, 46 Atl. 929.

¹⁹ *Downing v. Road Co.*, 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148. And see *Whitaker v. Canal Co.*, 87 Pa. 34.

to individuals, will never be implied, but must be expressly conferred. As was said by Chief Justice Marshall: "The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt them from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist."²⁰

On the other hand, when the language to be construed does not involve a grant of property or of rights in which the public is interested, it seems that the charter should be construed, not strictly, but according to its fair and natural meaning with reference to the purposes and objects of the corporation.²¹

General Terms Following Special Terms.

The rule of statutory construction, "that, where general words follow an enumeration of persons or things by words of particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned,"²² applies, of course, to the construction of charters. Thus, where a corporation was authorized by its charter "to carry on the business of mechanical engineers and general contractors," it was held that the term "general contractors" would be referred to that which was immediately before, and authorized such contracts only as mechanical engineers were in the habit of making.²³ In constru-

²⁰ *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939.

²¹ "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created." *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326. See, also, *Downing v. Road Co.*, 40 N. H. 230; *Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515.

²² Black, *Interp. Laws*, 141.

²³ *Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, 1 Cumming, *Cas. Priv. Corp.* 152. So, where the charter of a corporation authorized it "to purchase, lease, work, and sell mines, minerals, land, and buildings," the general words "land and buildings" were limited to land and buildings acquired for the purpose of purchasing, leasing, working or selling of mines and minerals. *Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche*, *supra*. There are many cases in which this

ing charters, as in construing other statutes, the intention of the legislature must always govern. Therefore, this rule must be disregarded where the legislative intention is plain to the contrary.²⁴

Express Mention and Implied Exclusion.

The general rule of statutory construction, that the express mention of one thing is tantamount to an exclusion of all others, applies to the construction of charters.²⁵ Therefore, if a charter expressly enumerates certain powers, this impliedly excludes all other powers except those mentioned, and such as may be necessary or proper to the execution of them. If, for instance, the charter of a corporation enumerates the purposes for which it may acquire and hold lands, it cannot acquire and hold land for any other purpose.²⁶ So, if a corporation is expressly authorized to lend money on bond and mortgage, it cannot lend on any other security.²⁷ And a bank authorized to do a banking business "by discounting" notes cannot buy them.²⁸

POWER TO TAKE AND HOLD REAL AND PERSONAL PROPERTY.

54. In the absence of express restrictions in its charter or in some statute applicable to it, a corporation has the implied power to take and hold property, real or personal, by purchase, gift, devise or bequest. But—

- (a) It cannot acquire or hold property for a purpose that is foreign to the objects for which it was created.**
- (b) In some jurisdictions there are statutory limitations on its power to take by devise.**

The power to purchase and hold such real and personal property as the purposes of the corporation may render necessary or proper is incident, at common law, to all private corporations, unless they are specially restrained by their charter or by some statute. Such power is generally expressly conferred by the charter; but it is not necessary that it should be, for it is always implied, in the absence of ex-

rule of construction has been applied. See ante, p. 61, where some of the cases are referred to.

²⁴ Black, *Interp. Laws*, 141, 143; ante, p. 61.

²⁵ Black, *Interp. Laws*, 146; *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, 1 Cumming, *Cas. Priv. Corp.* 106, *Shep. Cas. Corp.* 102; *Talmage v. Pell*, 7 N. Y. 328.

²⁶ *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, 1 Cumming, *Cas. Priv. Corp.* 106, *Shep. Cas. Corp.* 102.

²⁷ *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 81.

²⁸ *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683; post, p. 131.

press restriction.²⁹ And subject to the same limitations, it may take by gift, bequest, or devise.³⁰ As we shall presently see, it cannot purchase property for a purpose not authorized by its charter.³¹ Nor has it any right to take property, either real or personal, by gift, bequest, or devise, for an unauthorized purpose.³² Where a charter enumerates the purposes for which the corporation may acquire and hold real estate, it impliedly excludes all other purposes.³³ Therefore, where the charter of a railroad company authorized it to take lands for a right of way, and for certain enumerated purposes connected with the use and management of the road, it was held that it could not take lands by donation not for use in connection with the road.³⁴ In some states the amount or value of property which particular corporations may take is limited by charter or by statute. Such a restriction only applies to the value of the property at the time it is acquired, and a subsequent rise in value does not require the corporation to dispose of part of it, or affect its title.³⁵

By the English statutes of mortmain, corporations were prohibited from purchasing lands without license from the king, but these statutes, except in Pennsylvania, were not adopted in this country, and did not become a part of our law.³⁶ They have been recognized as in force in Pennsylvania so far as applicable to its conditions, and as having the effect of rendering void all conveyances or devises

²⁹ Co. Litt. 44c, 300b; 2 Kent, Comm. 281; *Nicoll v. Railroad Co.*, 12 N. Y. 121, 1 Cumming, Cas. Priv. Corp. 73; *Regents of University of Michigan v. Detroit Young Men's Soc.*, 12 Mich. 138; *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. 258, Fed. Cas. No. 1,521; *Lathrop v. Bank*, 3 Dana (Ky.) 114, 33 Am. Dec. 481; *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243; *Rivanna Nav. Co. v. Dawsons*, 3 Grat. (Va.) 19, 46 Am. Dec. 183. Where a corporation is legally organized for the specific purpose of dealing in land, its power to hold land is not limited. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225. A corporation is presumed in the absence of evidence to the contrary to have the right to purchase and hold real estate. *People v. La Rue*, 67 Cal. 526, 8 Pac. 84; *Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 936.

³⁰ Cases above cited. As to devise, see post, p. 122.

³¹ Post, p. 130.

³² *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, 1 Cumming, Cas. Priv. Corp. 106, Shep. Cas. Corp. 102.

³³ Ante, p. 119.

³⁴ *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, 1 Cumming, Cas. Priv. Corp. 106, Shep. Cas. Corp. 102.

³⁵ 2 Inst. 722; *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633.

³⁶ 2 Kent, Comm. 281-283; *Rivanna Nav. Co. v. Dawsons*, 3 Grat. (Va.) 19, 46 Am. Dec. 183; *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016; *Moore's Heirs v. Moore's Devisees*, 4 Dana (Ky.) 354, 20 Am. Dec. 417; *Lathrop v. Bank*, 8 Dana (Ky.) 114, 33 Am. Dec. 481; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378, 1 Cumming, Cas. Priv. Corp. 76.

of land to or for the use of a corporation, unless sanctioned by its charter or by act of the legislature.³⁷ Even in Pennsylvania, however, it has been held by the United States supreme court that a conveyance of land to a corporation without legislative sanction vests the title in the corporation, subject to forfeiture at the instance of the commonwealth only.³⁸

A corporation is not prevented from taking a grant of land in fee by the fact that its period of existence is limited to a term of years. Such a corporation may take a fee-simple title, and may sell the land whenever it is no longer necessary or convenient, though it could not hold and enjoy the same after the expiration of its charter.³⁹ "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; ⁴⁰ but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter." ⁴¹ Where a corporation acquires title to land in fee simple, the land does not revert to the grantor or his heirs on abandonment of its use for corporate purposes, unless it is so provided in the charter or in some statute.⁴²

At common law, none but natural persons can take in joint tenancy. A corporation cannot take such an estate, either jointly with another corporation or with a natural person. The reason assigned by the early writers is that they hold in different capacities and in different rights.⁴³ There is nothing, however, to prevent a corporation and a natural person, or two corporations, from holding as tenants in common.⁴⁴

³⁷ *Methodist Church v. Remington*, 1 Watts (Pa.) 219, 26 Am. Dec. 61.

³⁸ *Runyan v. Coster's Lessee*, 14 Pet. (U. S.) 122, 10 L. Ed. 382.

³⁹ *Nicoll v. Railroad Co.*, 12 N. Y. 121, 1 Cumming, Cas. Priv. Corp. 73; *People v. Mauran*, 5 Denio (N. Y.) 389; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378, 1 Cumming, Cas. Priv. Corp. 76; *Rives v. Dudley*, 3 Jones, Eq. (N. C.) 126, 67 Am. Dec. 231; *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487.

⁴⁰ The doctrine that, on dissolution, the land reverts, no longer prevails, at least with respect to joint-stock corporations; the rule being that the land passes into administration for the benefit of creditors first and stockholders afterwards. *Bacon v. Robertson*, 18 How. (U. S.) 480, 15 L. Ed. 499; *Heath v. Barmore*, 50 N. Y. 802; *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. Rep. 778. See, also, *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

⁴¹ 2 Kent, Comm. 282.

⁴² *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378, 1 Cumming, Cas. Priv. Corp. 76.

⁴³ *Telfair v. Howe*, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637.

⁴⁴ See *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412, 2 Cumming, Cas. Priv. Corp. 87.

Power to Take by Devise.

By the English statute of wills passed in the time of Henry VIII., corporations, by express exception, were not allowed to take real estate by will; and in some of our states the statute of wills prohibits devises to a corporation, unless it be expressly authorized by its charter or by statute to take by devise.⁴⁵ In the absence of such a restriction in a statute, or in the charter of a corporation, it may take real estate by devise as well as by purchase.⁴⁶ If the charter of a corporation prohibits it from taking by devise, it cannot take in another state, though there may be no prohibitory statute in the latter state, for a prohibitory clause in the charter of a corporation cleaves to it everywhere; but it has been held that a statute of wills of one state, since it has no extraterritorial effect, cannot prevent a corporation of that state from taking by devise in another state, where there is no such prohibition.⁴⁷

It seems that the statute of wills, in prohibiting a devise to a corporation, does not render invalid a devise to a natural person in trust to apply the rents and profits for the use and benefit of a corporation, as the devise in such a case is not to the corporation, but to the trustee; but on this point there is some doubt, and the contrary has been held under the New York statute.⁴⁸

Power to Take Mortgage.

If a corporation is authorized to engage in a transaction by which a third person becomes indebted to it, it has the implied power, in

⁴⁵ See *McCartee v. Society*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *Starkweather v. Society*, 72 Ill. 50, 22 Am. Rep. 133. Such a provision does not prevent a corporation from taking money under a will, though raised by a conversion of land under a power in the will. *Downing v. Marshall*, supra. But where real estate itself is devised to a corporation, which is incapable of taking real estate in that way, a court of equity has no power to convert it into money, and direct the payment of the money to it. Such direction must appear in the will. *Starkweather v. Society*, supra. A devise to a corporation not authorized to take land by devise is not made valid by amendment of its charter after the testator's death. *White v. Howard*, 46 N. Y. 144.

⁴⁶ *White v. Howard*, 38 Conn. 342, 1 Cumming, Cas. Priv. Corp. 81. *Rivanna Nav. Co. v. Dawsons*, 3 Grat. (Va.) 19, 46 Am. Dec. 183. *Moore's Heirs v. Moore's Devisees*, 4 Dana (Ky.) 354, 29 Am. Dec. 417; *American Bible Soc. v. Marshall*, 15 Ohio St. 537. Contra, *House of Mercy v. Davidson*, 90 Tex. 529, 39 S. W. 924.

⁴⁷ *White v. Howard*, supra. Contra, *Starkweather v. Society*, 72 Ill. 50, 22 Am. Rep. 133. But where the laws of a state prohibit a corporation from taking by devise, a devise to a foreign corporation is void, though by its charter it is authorized to take by devise. *White v. Howard*, 46 N. Y. 144.

⁴⁸ *McCartee v. Society*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290.

the absence of prohibition in its charter, to take a mortgage on real estate to secure the debt; and such a transaction is not within a prohibition against dealing in lands.⁴⁹

POWER TO ACT AS TRUSTEE.

55. A corporation having power to take and hold property has the capacity to take and hold the same in trust, and to execute the trust, if the trust is not repugnant to the purposes for which it was created. In the latter case, the trust, if otherwise good, is not void, but a court of equity will appoint a new trustee to execute it.

It was at one time considered that a corporation aggregate had no capacity to act as trustee, executor, guardian, etc. The reason given by Blackstone why it could not act as executor or administrator was that it could not take the necessary oath. Another reason why it could not act as trustee, which was often assigned, was that a court of equity sometimes enforced a trust by laying hold of the conscience of the trustee, and a corporation aggregate had no conscience. The reason most commonly given was that appointment as trustee involved a personal trust, and therefore a corporation lacked one of the essential requisites of a good trustee,—personal confidence. These reasons are all artificial and without weight, and the old doctrine which was based upon them has been exploded and repudiated; and it is now well settled that a corporation, if authorized by its charter, as in the case of modern trust companies, hospitals, universities, etc., may act as a trustee to the same extent as a natural person.⁵⁰ Statutes have been enacted, in many states, authorizing the formation of corporations with the power to act as trustee, executor, administrator, or guardian, and such statutes have been held valid.⁵¹ Independently of any statute, where a corporation has the power to take real and personal property by conveyance and by devise, it may also so take and hold property in trust in the same manner, and to the same extent, as a natural person may. If the trust is repugnant to, or inconsistent with, the purpose for which the corporation was created, it cannot be compelled to execute the

⁴⁹ *Blunt v. Walker*, 11 Wis. 834, 78 Am. Dec. 709.

⁵⁰ *Vidal v. Mayor, etc.*, 2 How. (U. S.) 127, 183, 11 L. Ed. 205; *Trustees of Phillip's Academy v. King*, 12 Mass. 546; *Chambers v. City of St. Louis*, 29 Mo. 548; *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; *White v. Rice*, 112 Mich. 403, 70 N. W. 1024.

⁵¹ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; *Union Bank & Trust Co. v. Wright* (Tenn. Ch. App.) 58 S. W. 755, 52 L. R. A. 469.

trust; but the trust, if otherwise unexceptionable, will not be void, and a court of equity will appoint a new trustee to carry out its objects.⁵² If property is conveyed, bequeathed, or devised to a corporation in trust, and the trusts are in themselves valid, but the corporation, by reason of its purpose, is incompetent to execute them, the heirs of the grantor or testator cannot take advantage of such inability. The objection can be raised only by the state in its sovereign capacity, by a quo warranto or other proper judicial proceeding.⁵³

POWERS AS TO CONTRACTS AND CONVEYANCES.

- 56. A corporation has no power to enter into any contract that is not expressly or impliedly authorized by its charter. But any contract that is reasonably necessary or proper for carrying out the powers expressly conferred is impliedly authorized. Among the powers impliedly conferred upon every corporation, in the absence of express restrictions in its charter, are the following:**
- (a) A corporation has the implied power to purchase such real and personal property as its purposes may require; but it has no power to purchase property for a purpose foreign to the objects for which it was created.**
 - (b) A corporation generally has the implied power to sell and convey or mortgage real or personal property owned by it. But a railroad company, or other quasi public corporation, cannot dispose of or mortgage property which is needed in order to carry on the business for which it was created, unless expressly authorized. Nor can a corporation transfer or mortgage its franchise without statutory authority.**
 - (c) It has the power to borrow money whenever the nature of its business renders it proper or expedient.**
 - (d) It has the power to execute a bond for any purpose for which it may contract a debt.**
 - (e) In this country it has the power to make or indorse promissory notes, and to draw, indorse, or accept bills of exchange, if it is a usual or proper means of accomplishing the objects for which it was created.**
 - (f) Subject to certain exceptions, it has no power to enter into a contract of suretyship or guaranty unless the power is expressly conferred. And it cannot bind itself by an accommodation note or bill.**
 - (g) It has no implied power to enter into a contract of partnership. But it may contract jointly with another.**
 - (h) Though there are some cases to the contrary, by the better opinion a corporation has no power, unless expressly authorized, to subscribe for or purchase stock in another corporation. But it may in good faith take and hold stock in another corporation to secure a loan previously made by it, or a debt due it, or in payment of such loan or debt.**

⁵² *Vidal v. Mayor, etc.*, 2 How. (U. S.) 127, 183, 11 L. Ed. 205.

⁵³ *Id.*

(1) In some jurisdictions it is held that a corporation has no implied power to purchase its own stock, either for the purpose of selling or reissuing it, or for the purpose of holding or retiring it, though it may take its own stock to secure a loan previously made or a debt due it, or in payment of such loan or debt. In most jurisdictions in this country a corporation may, in the absence of express restrictions, purchase its own stock, provided the purchase be not to the injury of its creditors.

(2) A corporation has no power to consolidate with another corporation, unless the power is expressly conferred upon it.

57. The presumption is that contracts of a corporation are within its powers, and the burden of showing the contrary rests upon the party who objects.

Since a corporation has such powers only as are expressly or impliedly conferred upon it, by its charter, it follows that it cannot legally enter into any contract that is not expressly or impliedly authorized.⁵⁴ A contract in excess of its powers is said to be ultra vires. Whether it is void or not is a question upon which the courts do not agree. We shall consider the effect of ultra vires contracts in a subsequent chapter.

Powers Impliedly Conferred.

As has been stated generally in a former section, power to enter into a particular contract need not be expressly conferred. On the contrary, the power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which the corporation was created, is always implied, where there is no positive restriction in the charter.⁵⁵ "When a charter

⁵⁴ Coleman v. Railway Co., 10 Beav. 1, 1 Cumming, Cas. Priv. Corp. 136; East Anglian Rys. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Cumming, Cas. Priv. Corp. 142; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43, 28 Am. Rep. 9, 1 Cumming, Cas. Priv. Corp. 343; Pearce v. Railroad Co., 21 How. (U. S.) 441, 16 L. Ed. 184, 1 Cumming, Cas. Priv. Corp. 146; Downing v. Road Co., 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148; W. D. Smith, Cas. Corp. 129, Shep. Cas. Corp. 75; Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; 1 Cumming, Cas. Priv. Corp. 152; Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950, 1 Cumming, Cas. Priv. Corp. 164; W. D. Smith, Cas. Corp. 132, Shep. Cas. Corp. 70; Davis v. Railroad Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Cumming, Cas. Priv. Corp. 173; Weckler v. Bank, 42 Md. 581, 20 Am. Rep. 95; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100; Tomkinson v. Railway Co., 35 Ch. Div. 675.

⁵⁵ Morville v. Society, 123 Mass. 129, 136, 25 Am. Rep. 40. And see Union Bank v. Jacobs, 6 Humph. (Tenn.) 515, 1 Cumming, Cas. Priv. Corp. 302, W. D. Smith, Cas. Corp. 139, Shep. Cas. Corp. 126; London & N. W. Ry. Co. v. Price, 11 Q. B. Div. 485, 2 Cumming, Cas. Priv. Corp. 83; Simpson v. Hotel Co., 8 H. L. Cas. 712; Ft. Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167, Shep. Cas. Corp. 98; Colorado Springs Co. v.

or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The creation of a corporation for a specific purpose implies a power to use the necessary and usual means to effectuate that purpose."⁵⁶

Thus, a corporation, unless restricted by its charter, has the implied power to lease or mortgage property lawfully held by it under its charter, and not immediately needed for its own business;⁵⁷ or to sell property that will no longer be needed at all;⁵⁸ or to borrow money when necessary, and to execute instruments to secure the loan.⁵⁹ A corporation established "for the purpose of manufacturing and selling glass" may contract to purchase glassware from a like corporation to keep up its own stock and supply its customers while its works are being put in order.⁶⁰ A corporation authorized to purchase and hold waterpower created by the erection of dams, and to hold real estate, may, when the water power has been lawfully extinguished, sell its lands, and, as part of the contract of sale, agree to raise the grade.⁶¹ So, a railroad corporation may agree to transport as a common carrier, over connecting railroads, goods intrusted to it for carriage over its own line.⁶² Many other illustrations will appear in the following paragraphs.

As a general rule, subject to exceptions which we shall presently notice, when a corporation is given general authority to engage in business, and there are no special restraints in its charter, it takes

American Pub. Co., 97 Fed. 843, 38 C. C. A. 433; *Sun Printing & P. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; *Flaherty v. Portland Longshoremen's Benev. Soc.*, 99 Me. 253, 59 Atl. 58.

⁵⁶ *Munn v. Commission Co.*, 15 Johns. (N. Y.) 52, 8 Am. Dec. 219.

⁵⁷ *Post*, p. 132. Where a corporation chartered to manufacture cars constructed larger boilers than necessary, but such as would be necessary to supply its future needs, it was not beyond its powers to sell steam generated in such boilers. *People v. Pullman Palace-Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

⁵⁸ *Dupee v. Water-Power Co.*, 114 Mass. 37; *post*, p. 182.

⁵⁹ *Post*, pp. 136-138.

⁶⁰ *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315. But a corporation for the purpose of manufacturing and selling gold and silver ware cannot, as a part of its business, engage in the purchase and sale of goods of the same general character, but which it cannot advantageously manufacture. *People v. Campbell*, 144 N. Y. 166, 38 N. E. 990.

⁶¹ *Dupee v. Water-Power Co.*, 114 Mass. 37.

⁶² *Swift v. Steamship Co.*, 106 N. Y. 206, 12 N. E. 583, 2 Cumming, Cas. Priv. Corp. 98; *Hill Mfg. Co. v. Boston & L. R. Corp.*, 104 Mass. 122, 6 Am. Rep. 202; *Ohio & M. Ry. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693.

the power as a natural person enjoys it, with all its incidents and accessories. It may, like a natural person, make all contracts, not prohibited, which are necessary or proper to enable it to attain its legitimate objects.⁶³ A business corporation may incur liability for a reward by offering the same for the apprehension of criminals who have committed crimes against its property or its employes.⁶⁴ If the charter of a street-railroad company specifies a particular motive power, it excludes all other motive powers; but, if the motive power is in no way limited or defined, any motive power may be used that may be fit and appropriate to enable the company to operate its road.⁶⁵

Powers not Impliedly Conferred.

But, while power on the part of a corporation to make such contracts as are reasonably necessary to attain its legitimate purposes will be implied, a corporation has no implied power to enter into contracts in aid of other purposes. The fact that a particular contract may be profitable to the corporation is immaterial.⁶⁶

It has been held, for instance, that a railroad company, which has been given the power only to construct, maintain, and operate a certain railroad, and to do all that may be necessary for the purpose of carrying on and working the road, has no power to pledge its funds for the purpose of supporting or aiding in the support of another corporation to operate a connecting steamboat line, however much such an arrangement may increase the traffic on the railroad.⁶⁷ So, it has been held that a railroad company has no implied power to purchase and operate a steamboat, at least on waters at the terminus of its line, or at any other place where a steamboat is not necessary

⁶³ Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412. Acts of a corporation, which, if standing alone or engaged in as a business, would be beyond its implied powers, are not necessarily ultra vires, when they are incidental to a transaction which in its general scope is within the corporate purposes. Central Ohio Nat. G. & F. Co. v. Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395.

⁶⁴ Norwood & B. Co. v. Andrews, 71 Miss. 641, 16 South. 262; Central R. & B. Co. v. Cheatham, 85 Ala. 292, 4 South. 828, 7 Am. St. Rep. 48; American Exp. Co. v. Patterson, 73 Ind. 430; Ricord v. Railroad Co., 15 Nev. 167.

⁶⁵ Halsey v. Railway Co., 47 N. J. Eq. 380, 20 Atl. 859.

⁶⁶ Coleman v. Railway Co., 10 Beav. 1, 1 Cumming, Cas. Priv. Corp. 136; Davis v. Railroad Co., 131 Mass. 258, 41 Am. Rep. 221, 1 Cumming, Cas. Priv. Corp. 173; Tomkinson v. Railway Co., 35 Ch. Div. 675; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; and the other cases cited above.

⁶⁷ Coleman v. Railway Co., 10 Beav. 1, 1 Cumming, Cas. Priv. Corp. 136. But see Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413.

to the operation of the road;⁶⁸ or to lease and operate another railroad;⁶⁹ or to lease or transfer its own road to another corporation or person;⁷⁰ or to enter into a consolidation agreement with another railroad corporation;⁷¹ or to lease or transfer to another a telegraph line which it has constructed and is operating under its charter.⁷²

So, where a corporation was empowered to lay out and maintain a road from some point in the vicinity of Mt. Washington to the top of the mountain, to take tolls of passengers and for carriages, to build and own tollhouses, and to take land for their road, it was held that the corporation had no power to purchase omnibuses, wagons, horses, etc., and engage in the carriage of passengers and their baggage on its road.⁷³ A manufacturing corporation cannot engage in the business of buying and selling goods, except so far as necessary or incidental to the business of manufacturing.⁷⁴ It has been held that a manufacturing corporation authorized to engage in the manufacture of firearms and other implements of war cannot lawfully engage in the manufacture of railroad locks.⁷⁵

⁶⁸ *Pearce v. Railroad Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184, 1 Cumming, Cas. Priv. Corp. 146; *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353. It would doubtless be different if a corporation were chartered to construct and operate a railroad along a route crossing a wide river, or under other circumstances rendering transportation by water necessary to the operation of the road.

⁶⁹ *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, 1 Cumming, Cas. Priv. Corp. 142.

⁷⁰ *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; 1 Cumming, Cas. Priv. Corp. 164, W. D. Smith, Cas. Corp. 132, Shep. Cas. Corp. 70; *York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. Ed. 27; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83, and *Id.*, 118 U. S. 630, 7 Sup. Ct. 24, 30 L. Ed. 284; *Black v. Canal Co.*, 22 N. J. Eq. 130; *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; post, p. 132.

⁷¹ *Pearce v. Railroad Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184, 1 Cumming, Cas. Priv. Corp. 146; *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 17 L. Ed. 604.

⁷² *American Union Tel. Co. v. Union Pac. Ry. Co.* (C. C.) 1 McOrary, 541, 1 Fed. 745, 1 Cumming, Cas. Priv. Corp. 284; post, p. 122.

⁷³ *Downing v. Road Co.*, 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148, W. D. Smith, Cas. Corp. 129, Shep. Cas. Corp. 75.

⁷⁴ *Powell v. Murray*, 8 App. Div. 273, 38 N. Y. Supp. 233, affirmed 157 N. Y. 717, 52 N. E. 1130; *Bosshardt & Wilson Co. v. Crescent Oil Co.*, 171 Pa. 109, 32 Atl. 1120; *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; *Richmond Guano Co. v. Farmers' C. S. Oil M. & Ginnery* (C. C.) 119 Fed. 709, *Id.*, 126 Fed. 712, 61 C. C. A. 630.

⁷⁵ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cumming, Cas. Priv. Corp. 253. So, a corporation for the purpose of manufacturing

It has been held that a railroad corporation cannot enter into a valid contract to pay money to defray the expenses of holding a festival, though by bringing strangers into the place their business may be greatly increased.⁷⁶ On the other hand, it has been held that a subscription by a hotel company to a fund to establish a military encampment, which would be likely to attract strangers to town, was not ultra vires.⁷⁷ Other illustrations are given below.⁷⁸

and dealing in metal goods cannot contract with another company, engaged in manufacturing carbons for electric lighting, to sell its carbons for a term of years. *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170.

⁷⁶ *Davis v. Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221, 1 Cumming, Cas. Priv. Corp. 173. And see *Tomkinson v. Railway Co.*, 35 Ch. Div. 675.

⁷⁷ In *Richelleu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1044, 83 Am. St. Rep. 234, however, it was held that a subscription by an hotel company to a fund to establish a military encampment, which would be likely to attract strangers, necessarily requiring hotel accommodations, was not ultra vires. So, it has been held by the Illinois court that a business corporation may subscribe money in consideration of securing the location of a post office near its place of business. *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146, affirming 55 Ill. App. 556. And in *Temple Street Cable Ry. Co. v. Hellman*, 103 Cal. 634, 37 Pac. 530, the giving of its note by a street-railroad company, as an inducement to the establishment of a baseball park, which would increase its traffic, was sustained against an attack upon it as ultra vires. And see *Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145.

⁷⁸ National banks have no authority to sell railroad bonds on commission. *Weckler v. Bank*, 42 Md. 581, 20 Am. Rep. 95. A railroad corporation cannot engage in banking as by issuing paper designed to circulate as bank notes, or deal in notes and bills. *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240. In *Byrne v. Manufacturing Co.*, 65 Conn. 336, 81 Atl. 833, 28 L. R. A. 304, the officers of an insolvent corporation, for the purpose of avoiding dissolution, transferred all its property to another corporation, which had been organized to continue its business, and accepted, in payment, stock in the new corporation, to be held by trustees named by such officers. The contract was held ultra vires. A railroad corporation has no power to employ a person to make a report on mines of which its road is the outlet, though its business is benefited thereby. *George v. Railroad Co.*, 22 Nev. 228, 38 Pac. 441. A corporation authorized by its charter to make contracts of fire and marine insurance, to loan money on bottomry, respondentia, or mortgage, to buy mortgaged property when necessary to secure debts, and to purchase and hold property necessary to carry on its business, but being expressly prohibited from exercising banking powers, cannot loan money on the discount of notes; and this would be so without such express prohibition. *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100. A society incorporated for religious worship has no power to contract for a steamboat excursion, to raise money for church purposes, and cannot recover for expenses or loss of anticipated profits by reason of the defendant's breach of such a contract. *Harriman v. Baptist Church*, 63 Ga. 186, 36 Am. Rep. 117.

Power to Purchase Real or Personal Property.

We have already seen that a corporation, unless prohibited, has the capacity to take and hold the title to both real and personal property. It must not be supposed, however, that it has an unlimited power to purchase property, for it has not. It has the implied power, in the absence of express restrictions, to purchase any property, real or personal, that may be reasonably necessary or proper to accomplish the purposes for which it was created.⁷⁹ But it has no power to purchase property for a purpose foreign to the objects of its creation.⁸⁰ A corporation established "for the purpose of manufacturing and selling glass" may contract to purchase glassware from a like corporation, in order to keep up its own stock and supply its customers while its works are being put in order, for this is necessary in order to carry on its business.⁸¹ A railroad company has the implied power to purchase iron rails for use in building its road, but a purchase of

⁷⁹ Personal property: *Lyndenborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Moss v. Averell*, 10 N. Y. 449; *Mahoney v. Butte Hardware Co.*, 19 Mont. 377, 48 Pac. 545; *Id.*, 27 Mont. 463, 71 Pac. 674. Real property: *Ante*, p. 119; *Co. Litt.* 44c, 300b; 2 Kent, Comm. 281; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Nicoll v. Railroad Co.*, 12 N. Y. 121, 1 Cumming, Cas. Priv. Corp. 73; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 38, 66 Am. Dec. 394; *Regents of University of Michigan v. Detroit Young Men's Soc.*, 12 Mich. 138; *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68, 40 Atl. 218. As we have seen, a corporation may purchase and take a fee-simple title to land, though the period of its existence is limited to a term of years. *Ante*, p. 121.

⁸⁰ Personal property: *Pearce v. Railroad Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184, 1 Cumming, Cas. Priv. Corp. 146; *Downing v. Road Co.*, 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148, W. D. Smith, Cas. Corp. 129, *Shep. Cas. Corp.* 75; *Day v. Buggy Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352, 1 Cumming, Cas. Priv. Corp. 261; *Northwestern Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781, 1 Cumming, Cas. Priv. Corp. 245; *Bosshardt & Wilson Co. v. Crescent Oil Co.*, 171 Pa. St. 109, 32 Atl. 1120. Real property: *Bank of Michigan v. Niles*, Walk. Ch. (Mich.) 99, 1 Cumming, Cas. Priv. Corp. 291; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, 1 Cumming, Cas. Priv. Corp. 106, *Shep. Cas. Corp.* 102; *National Home Bldg. & L. Ass'n v. Home Savings Bank*, 181 Ill. 35, 54 N. E. 610, 72 Am. St. Rep. 245, 64 L. R. A. 399. A corporation chartered to manufacture cars, and empowered to purchase and hold such real estate as might be necessary for the successful prosecution of its business, has no power to purchase real estate on which it lays out a town, with streets, sewerage, water and light systems, and erect dwellings, schoolhouses, churches, and business houses, in order to furnish homes and the conveniences and necessities of life to its employes, since such scheme is not necessary to the prosecution of its business. *People v. Pullman Palace-Car Co.*, 175 Ill. 125, 51 N. E. 665, 64 L. R. A. 366. But see *Steinway v. Steinway & Sons*, 40 N. Y. Supp. 718, 17 Misc. Rep. 43.

⁸¹ *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315.

rails to sell them again on speculation would be ultra vires; and the same is true of other corporations. A manufacturing corporation, though it may purchase materials to use in manufacture, cannot purchase to sell on speculation.⁸² A railroad, steamboat, or canal company can purchase grain or other produce for its own use, but it cannot purchase the same to transport it to another market, and sell it.⁸³ A bank authorized by its charter to carry on the business of banking "by discounting bills, notes, and other evidences of debt, * * * and by exercising such incidental powers as may be necessary to carry on such business," has no power to buy notes or bonds, and deal in them in this way.⁸⁴ Nor can a railroad company deal in bills or notes.⁸⁵ But either a bank or a railroad company can take bills or notes in the course of its business, as to secure a debt due to it; and the same is true of all other corporations.⁸⁶

And so it is with purchases of real estate. A railroad, banking, or manufacturing corporation may purchase such real estate as may be necessary for the convenient transaction of its business; but it cannot enter into a valid contract to purchase land, not for use in its business, but as a speculation.⁸⁷

It has been said that a corporation has no power, unless it is expressly conferred, to purchase property of any kind on credit, unless it is needed for immediate use, or the investment of existing funds.⁸⁸

⁸² *Day v. Buggy Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352, 1 Cumming, Cas. Priv. Corp. 261. And see *Chewacla Lime-Works v. Dismukes*, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100; *Bosshardt & W. Co. v. Crescent Oil Co.*, 171 Pa. St. 109, 32 Atl. 1120. Purchases by a cotton mill corporation of cotton for future delivery on margin are not ultra vires, if for legitimate use and not speculation. *Sampson v. Camperdown Cotton Mills (C. C.)* 82 Fed. 833.

⁸³ *Northwestern Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781, 1 Cumming, Cas. Priv. Corp. 245.

⁸⁴ *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683; *Niagara County Bank v. Baker*, 15 Ohio St. 68; *Talmage v. Pell*, 7 N. Y. 328; *First Nat. Bank v. Pierson*, 24 Minn. 140, 31 Am. Rep. 341. But see *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235.

⁸⁵ *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240.

⁸⁶ *Goodrich v. Reynolds*, supra; *McIntire v. Preston*, 5 Gilman (Ill.) 48, 48 Am. Rep. 321.

⁸⁷ *President, etc., of Bank of Michigan v. Niles*, Walk. Ch. (Mich.) 99; *Id.*, 1 Doug. 401, 41 Am. Dec. 575, 1 Cumming, Cas. Priv. Corp. 291; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, 1 Cumming, Cas. Priv. Corp. 106, *Shep. Cas. Corp.* 102; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369.

⁸⁸ *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9, 1 Cumming, Cas. Priv. Corp. 343.

Power to Sell, Lease, Mortgage, or Pledge Property.

In the absence of express restrictions in its charter, and subject to exceptions to be presently noticed, a corporation has the implied power to sell and convey or transfer,⁸⁹ or to lease,⁹⁰ all or a part of its real or personal property.⁹¹ And whenever a corporation has the power to borrow money, or to otherwise incur debts, it has, as incidental thereto, unless expressly restricted, the implied power to execute a mortgage on its property, real or personal, or to pledge its property, to secure its debts, whether the debts have been previously contracted, or are contracted at the time, or are to be contracted in the future.⁹²

⁸⁹ *Post v. Beacon Vacuum Pump & E. Co.*, 84 Fed. 371, 28 C. C. A. 431; *Morissette v. Howard*, 62 Kan. 463, 63 Pac. 756. It is not ultra vires for a manufacturing corporation to give away some of its manufactured goods for the purpose of extending their reputation. *Steinway v. Steinway & Sons*, 40 N. Y. Supp. 718, 17 Misc. Rep. 43.

⁹⁰ *Simpson v. Hotel Co.*, 8 H. L. Cas. 712; *Featherstonehaugh v. Lee Moore Porcelain Clay Co.*, L. R. 1 Eq. 318; *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326; *People v. Pullman Palace-Car Co.*, 175 Ill. 125, 51 N. E. 665, 64 L. R. A. 366; *Plant v. Macon Oil & I. Co.*, 103 Ga. 666, 30 S. E. 567. A corporation engaged in carrying on a department store may lease space to a person who is to conduct a department therein in consideration of a percentage of the moneys to be derived from sales. *Standard Fashion Co. v. Slegel-Cooper Co.*, 44 App. Div. 121, 60 N. Y. Supp. 739. A corporation authorized to hold real estate may lease it for use in a business which it is not authorized to carry on. *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Nantasket Beach S. S. Co. v. Shea*, 182 Mass. 147, 65 N. E. 57.

⁹¹ *Hendee v. Pinkerton*, 14 Allen (Mass.) 381, 1 Cumming, Cas. Priv. Corp. 336; *State v. Western Irr. Canal Co.*, 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; *Leggett v. Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Dupee v. Water-Power Co.*, 114 Mass. 37; *Aurora A. & H. Soc. v. Paddock*, 80 Ill. 263; *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454; *Reynolds' Widow v. Commissioners*, 5 Ohio, 204; *Miners' Ditch Co. v. Zellerbach*, 87 Cal. 543, 99 Am. Dec. 300. "All civil corporations, * * * unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had, an unlimited control over their respective properties, and may alienate in fee, or make what estates they please, for years, for life, or in tail, as fully as any individual may do with respect to his own property." 1 Kyd, Corp. 108.

⁹² *Barry v. Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *Curtis v. Leavitt*, 15 N. Y. 9; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; *Eureka Iron & Steel Works v. Bresnahan*, 60 Mich. 332, 27 N. W. 524; *In re Patent Fille Co.*, 6 Ch. App. 83, 1 Cumming, Cas. Priv. Corp. 322; *W. D. Smith, Cas. Corp.* 125, *Shep. Cas. Corp.* 109; *Aurora A. & H. Soc. v. Paddock*, 80 Ill. 263; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Jones v. Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030, 1 Cumming, Cas. Priv. Corp. 326; *Railroad Co. v. Howard*, 7 Wall. 892, 19 L. Ed. 117; *Booth v. Robinson*, 55 Md. 419; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381, 1 Cumming, Cas. Priv. Corp. 336; *Thompson v. Lambert*, 44 Iowa, 239; *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039; *Evans v. Heating Co.*, 157 Mass. 37, 31 N. E. 698; *Leggett v.*

The power of a corporation to execute a mortgage on its property can only be co-extensive with its power to alienate absolutely, since every mortgage may become an absolute conveyance by foreclosure.⁹³ In like manner a corporation may make an assignment of its property for the payment of its debts.⁹⁴ And if the corporation is insolvent, or the business is unprofitable, and the enterprise a failure, a majority of the stockholders may sell all the corporate property.⁹⁵

In the absence of statutory authority a corporation can neither sell nor mortgage its franchises.⁹⁶ But the power to mortgage corporate franchises may be, and often is, conferred by statute.⁹⁷

By the weight of authority, a railroad company, or other corporation that is vested with the power of eminent domain, and charged with peculiar duties to the public, as telegraph, gas, and water companies, cannot, in the absence of express authority from the legislature, alienate, by absolute conveyance or by lease, property that is es-

Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; *Gordon v. Preston*, 1 Watts (Pa.) 385, 26 Am. Dec. 75; *Leo v. Railway Co.* (C. C.) 17 Fed. 273; *Duncomb v. Railroad Co.*, 84 N. Y. 190; *Jackson v. Brown*, 5 Wend. (N. Y.) 590; *Memphis & L. R. Co. v. Dow* (C. C.) 19 Fed. 388; *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; *Jessup v. Bridge*, 11 Iowa, 572, 79 Am. Dec. 513; *Hays v. Coal Co.*, 29 Ohio St. 330; *Bell & Coggeshall Co. v. Kentucky Glass Works Co.*, 48 S. W. 440, 20 Ky. Law, Rep. 1089; *Id.*, 106 Ky. 7, 50 S. W. 2. And a corporation having the power to execute a mortgage on its property to secure its debts may, in the absence of special restrictions, execute a mortgage to secure future advances. *Barry v. Exchange Co.*, *supra*. *Jones v. Indemnity Co.*, *supra*; *Richards v. Railroad Co.*, 44 N. H. 127.

⁹³ *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Cumming, Cas. Priv. Corp. 331, W. D. Smith, Cas. Corp. 127, Shep. Cas. Corp. 111.

⁹⁴ *Post*, p. 539.

⁹⁵ *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 893, 66 Am. Dec. 490; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. 42, 72 Am. Dec. 685; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 579, 99 Am. Dec. 300; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Phillips v. Providence Steam Engine Co.*, 21 R. I. 302, 43 Atl. 598, 45 L. R. A. 560; *Morissette v. Howard*, 62 Kan. 463, 63 Pac. 756; *post*, p. 539.

⁹⁶ *Carpenter v. Mining Co.*, 65 N. Y. 43, 50; *Beebe v. Power Co.*, 13 Misc. Rep. 737, 35 N. Y. Supp. 1; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315; *Arthur v. Bank*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; *City Water Co. v. State*, 88 Tex. 600, 32 S. W. 1033; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517; *Stewart v. Jones*, 40 Mo. 140; *Daniels v. Hart*, 118 Mass. 543; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

⁹⁷ See *Lord v. Gas Co.*, 99 N. Y. 547, 2 N. E. 909; *Davidson v. Gaslight Co.*, 99 N. Y. 558, 2 N. E. 892; *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422; *Wright v. Milwaukee Electric L. & Ry. Co.*, 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. Rep. 74; *Sioux City Terminal R. & W. Co. v. Trust Co. of N. A.*, 82 Fed. 124, 27 C. C. A. 73.

essential to enable it to properly perform its functions.⁹⁸ Nor, by the weight of authority, can it execute a mortgage on such property, in the absence of express authority, even to secure legitimate debts; for, as has been stated, the power to mortgage can only be co-extensive with the power to alienate absolutely, since every mortgage may become an absolute conveyance by foreclosure.⁹⁹ A railroad company, or similar

⁹⁸ *Com. v. Smith*, *supra*. "In the case of a railroad company," it was said by Hoar, J., in this case, "created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this purpose under the power of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature,—there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not in its own nature transmissible. * * * And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in business depends upon the performance of its public duties. Having once established its road, if that and the franchise of managing, using, and taking tolls and fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure." And see *Beman v. Rufford*, 1 Sim. (N. S.) 550; *Winch v. Railway Co.*, 5 De Gex & S. 562; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, 1 Cumming, Cas. Priv. Corp. 164, W. D. Smith, Cas. Corp. 132, Shep. Cas. Corp. 70; *York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. Ed. 27; *Black v. Canal Co.*, 22 N. J. Eq. 390; *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, 2 Cumming, Cas. Priv. Corp. 44; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748, 2 Cumming, Cas. Priv. Corp. 78; *American Union Tel. Co. v. Union Pac. Ry. Co.* (C. C.) 1 McCrary, 541, 1 Fed. 745, 1 Cumming, Cas. Priv. Corp. 284; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *Coe v. Railroad Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Brunswick Gas L. Co. v. United Gas. F. & L. Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; *Wolford v. Crystal Lake Cemetery Ass'n*, 54 Minn. 440, 56 N. W. 56; *Cumberland Tel. & Tel. Co. v. City of Evansville* (C. C.) 127 Fed. 187; note 91, *supra*, and cases there cited. But see *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; *Miller v. Railroad Co.*, 36 Vt. 452.

⁹⁹ *Com. v. Smith*, *supra*, and other cases cited above; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700. But see *Hunt v. Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006, where it was held that, when its charter does not confer the power of eminent domain or exclusive privilege, a gas company

corporation, however, has the same implied power as any other corporation, in the absence of special restraint, to alienate property which it has acquired otherwise than by the exercise of the power of eminent domain, and which is not necessary to enable it to perform its duties to the public.¹⁰⁰ And it has, of course, the same power to mortgage such property, if it does so for an authorized purpose.¹⁰¹

The legislature generally expressly authorizes these quasi public corporations to mortgage their property and franchises under certain circumstances. Of course, authority to mortgage for a specified purpose would, under familiar rules of construction, exclude all other purposes. If the legislature confers upon such a corporation power to mortgage its property without limitation, it authorizes a mortgage of the entire corporate property.¹⁰² If it confers the power to sell and transfer or alien absolutely, this will give the power to mortgage.¹⁰³ And power to mortgage includes, as a necessary incident, the power to borrow money and issue bonds therefor.¹⁰⁴ Where a railroad company has express authority to mortgage its property, a mortgage executed by it, covering both its property and franchise, will not be avoided as to the property by the fact that there was no authority to mortgage the franchise.¹⁰⁵ The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale and to transfer them with the corporate property of the company to the purchaser.¹⁰⁶

can mortgage its entire property to secure bonds and floating indebtedness, though the charter does not expressly confer the right to mortgage.

¹⁰⁰ *Hendee v. Pinkerton*, 14 Allen (Mass.) 381, 1 Cumming, Cas. Priv. Corp. 336; *Coe v. Railroad Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Benton v. City of Elizabeth*, 61 N. J. Law 411, 39 Atl. 683, 906; *Id.*, 61 N. J. Law 693, 40 Atl. 1132.

¹⁰¹ *Hendee v. Pinkerton*, *supra*.

¹⁰² *Pumphrey v. Threadgill*, 9 Tex. Civ. App. 184, 28 S. W. 450. As to what passes under a general railroad mortgage, the effect on after-acquired property, etc., see *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. 366, 3 Am. Rep. 596; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199; *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Hammock v. Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111.

¹⁰³ *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422; *McAllister v. Plant*, 54 Miss. 106.

¹⁰⁴ *Gloninger v. Railroad Co.*, 139 Pa. 13, 21 Atl. 211.

¹⁰⁵ *Id.*

¹⁰⁶ *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; *Chadwick v. Old Colony R. Co.* 171 Mass. 239, 50 N. E. 629. The right to be a corporation does not pass under a sale of the franchises. *People v. Cook*, 110 N. Y. 443, 18 N. E. 113; *Schurz v. Cook*, 145 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498; *Minor v. Erie R. Co.*, 171 N. Y. 566, 64 N. E. 454.

Power to Borrow Money.

Except in so far as there may be express restrictions in its charter, a private corporation may, like an individual, borrow money, whenever the nature of its business renders it proper or expedient that it should do so.¹⁰⁷ But if the purposes for which a corporation is organized and chartered do not require it to borrow money, it cannot do so; and it cannot do so for an unauthorized purpose.¹⁰⁸

It has been held, for instance, that building associations have no implied power to borrow money.¹⁰⁹ It seems clear that they have no power to borrow money for the purpose of lending it out again, for this is not within their purpose.¹¹⁰

Power to Execute Bonds.

Corporations, including railroad companies, have the implied power to execute bonds for any purpose for which they may lawfully contract a debt, in the absence of restrictions in their charter. "A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which they may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual, and peculiarly appropriate, form of corporate agreement."¹¹¹ When a statute specifies a particular manner in which bonds

¹⁰⁷ *Barry v. Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *Curtis v. Leavitt*, 15 N. Y. 9; *Nelson v. Eaton*, 26 N. Y. 410; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; *In re Patent File Co.*, 6 Ch. App. 83, 1 Cumming, Cas. Priv. Corp. 322, W. D. Smith, Cas. Corp. 125, Shep. Cas. Corp. 109; *Helronimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *Booth v. Robinson*, 55 Md. 419; *Commercial Bank of New Orleans v. Newport Manuf'g Co.*, 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Bradbury v. Canoe Club*, 153 Mass. 77, 26 N. E. 132; *Hays v. Coal Co.*, 29 Ohio St. 330. A mutual fire insurance company can borrow money to pay losses, and give its notes therefor. *Orr v. Insurance Co.*, 114 Pa. 387, 6 Atl. 696.

¹⁰⁸ *In re Cork & Youghal Ry. Co.*, 4 Ch. App. 748, 1 Cumming, Cas. Priv. Corp. 265; *In re National Building Society*, 5 Ch. App. 809, 1 Cumming, Cas. Priv. Corp. 274; *Wenlock v. River Dee Co.*, 19 Q. B. Div. 155, 1 Cumming, Cas. Priv. Corp. 277; *Bacon v. Insurance Co.*, 31 Miss. 116; *Adams & Westlake Co. v. Deyette*, 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751.

¹⁰⁹ *In re National Building Society*, *supra*.

¹¹⁰ *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258, 1 Cumming, Cas. Priv. Corp. 566; *North Hudson Mut. Bldg. & L. Ass'n v. Hudson First Nat. Bank*, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

¹¹¹ *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672, 1 Cumming, Cas. Priv. Corp. 331, W. D. Smith, Cas. Corp. 127, Shep. Cas. Corp. 111. And

shall be executed by a corporation, as is often the case, a failure to comply with the statute renders the bonds invalid.¹¹²

Bonds of corporations, and the coupons attached thereto, will be regarded as negotiable instruments, and as subject to the rules of law relating to such instruments, if it appears from the form in which they were issued, and the mode of giving them circulation, that they were intended to have this character; and they will be transferable like negotiable bills and notes, and subject to the rules protecting bona fide holders.¹¹³

Power to Make Negotiable Instruments.

It is held in England that a corporation cannot issue negotiable instruments unless the power is given expressly or by necessary implication from the nature and character of its business. Thus the power will be implied in the case of a corporation created for the purpose of trading,¹¹⁴ but not in the case of a railway company¹¹⁵ or of a mining company.¹¹⁶ In this country the rule is different. A corporation has the implied power to make or indorse promissory notes, and to draw, indorse, or accept bills of exchange, if it is a usual or appropriate means of accomplishing the objects and purposes for which it was created. It has the power to execute negotiable instruments when it has the power to borrow money.¹¹⁷ But if such acts are for-

see *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414, 16 L. Ed. 154; *Barry v. Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *Curtis v. Leavitt*, 15 N. Y. 9.

¹¹² *Com. v. Smith*, supra.

¹¹³ *White v. Railroad Co.*, 21 How. (U. S.) 575, 16 L. Ed. 221, 1 Cumming, Cas. Priv. Corp. 133; *American Nat. Bank v. American Wood-Paper Co.*, 19 R. I. 149, 32 Atl. 305, 29 L. R. A. 103, 61 Am. St. Rep. 746; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *Carr v. Le Fevre*, 27 Pa. St. 413; *City of Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Philadelphia & R. R. Co. v. Smith*, 105 Pa. 195; *Philadelphia & R. R. Co. v. Fidelity Insurance, Trust & Safe-Deposit Co.*, Id. 216; *Curtis v. Leavitt*, 15 N. Y. 9; *Woodbury v. Railroad Co.* (C. C.) 72 Fed. 371; *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081.

¹¹⁴ *Bateman v. Railway Co.*, L. R. 1 C. P. 499, 1 Cumming, Cas. Priv. Corp. 312; *In re General Estates Co.*, L. R. 3 Ch. 758; *In re Peruvian Co.*, L. R. 2 Ch. 617.

¹¹⁵ *Bateman v. Railway Co.*, supra.

¹¹⁶ *Dickinson v. Valpy*, 10 B. & C. 128; *Neale v. Turton*, 4 Bing. 149. See, also, *Bramah v. Roberts*, 3 Bing. N. C. 963; *Bult v. Morrell*, 12 Ad. & El. 745; *Thompson v. Universal Salvage Co.*, 1 Exch. 694; *Steele v. Harmer*, 14 M. & W. 831.

¹¹⁷ *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515, 1 Cumming, Cas. Priv. Corp. 302, W. D. Smith, Cas. Corp. 139, Shep. Cas. Corp. 126; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *Moss v. Averell*, 10 N. Y. 449; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Munn v.*

eign to the purposes of the charter, or repugnant thereto, the power does not exist.¹¹⁸ The right to set up the defense that the execution or indorsement of a negotiable instrument by a corporation was ultra vires, in order to defeat a recovery by a bona fide holder for value, will be shown in explaining the effect of ultra vires contracts.¹¹⁹

Contracts of Suretyship and Guaranty—Accommodation Paper.

As a general rule, to authorize a corporation to become guarantor or surety for another person or corporation, even for a valuable consideration paid to it, there must be an express grant of such power in its charter, or it must have been chartered for the purpose of becoming surety for others. The power is not ordinarily incident to corporations for railroading, banking, insurance, manufacturing, etc.¹²⁰ Nor

Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Olcott v. Railroad Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; *Richmond, F. & P. R. Co. v. Sneed*, 19 Grat. (Va.) 354, 100 Am. Dec. 670; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Ward v. Johnson*, 95 Ill. 215; *McIntire v. Preston*, 5 Gilman (Ill.) 48, 48 Am. Dec. 321; *Orr v. Insurance Co.*, 114 Pa. 387, 6 Atl. 696; *Hardy v. Merriweather*, 14 Ind. 203; *Ex parte Estabrook*, 2 Low, 547, Fed. Cas. No. 4,534; *Bradbury v. Canoe Club*, 153 Mass. 77, 26 N. E. 132; *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282; *National Loan & I. Co. v. Rockland Co.*, 94 Fed. 335, 86 C. C. A. 370. A railroad company, for instance, being empowered to construct and operate its road, may incur debts in carrying out its object; and, where a debt has been lawfully incurred, it may execute a promissory note or accept a bill of exchange in payment thereof, or it may raise money on a bill or note for the purpose of making such payment. *Union Bank v. Jacobs*, supra.

¹¹⁸ *National Park Bank v. German-American M. W. & S. Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673, 1 Cumming, Cas. Priv. Corp. 318, Shep. Cas. Corp. 132; *Bacon v. Insurance Co.*, 31 Miss. 116. Thus, a corporation cannot, even for a consideration paid, bind itself by indorsing promissory notes for accommodation of the maker. *National Park Bank v. German-American M. W. & S. Co.*, supra. And see note 121, infra, and cases there cited.

¹¹⁹ Post, p. 174.

¹²⁰ *National Park Bank v. German-American M. W. & S. Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673, 1 Cumming, Cas. Priv. Corp. 318, Shep. Cas. Corp. 132; *Memphis Grain & Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798; *Madison, Watertown & Milwaukee Plank-Road Co. v. Watertown & Portland Plank-Road Co.*, 7 Wis. 59; *Lucas v. Transfer Co.*, 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 439; *Culver v. Real-Estate Co.*, 91 Pa. 367; *Hall v. Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75; *Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co.*, 10 C. C. A. 415, 62 Fed. 356; *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167. No authority in a corporation to lend its credit to another is to be implied from the fact that it may be beneficial to the corporation to do so. *Germania Safety-Vault & Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. 797; *Rogers v. Jewell Belting Co.*, 184 Ill. 574, 56 N. E. 1017; *Best Brewing*

has a corporation any implied authority or power to accept a bill of exchange as an accommodation, or to execute an accommodation note, or to indorse a bill or note as an accommodation.¹²¹ Such contracts as these are clearly foreign to the objects of most corporations. The fact that a consideration is received by the corporation for entering into the contract can make no difference.¹²² We shall see, in another place that a corporation cannot always successfully defend against accommodation paper, where it has passed into the hands of a bona fide purchaser for value;¹²³ but this is based on peculiar reasons, and is not inconsistent with want of power to make the contract.

There may be circumstances under which a corporation would have the power to guaranty the debt of another person or corporation. Being authorized to make all contracts that may be necessary for accomplishing the purpose of its creation, a corporation, in making a contract which it is authorized to make, may, as a part of the consideration, become a guarantor.¹²⁴ Thus, a railroad company, for the

Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; *Sturdevant Bros. & Co. v. Farmers' & M. Bank*, 69 Neb. 220, 95 N. W. 819; *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Ward v. Joslin*, 105 Fed. 224, 44 C. C. A. 456. "It is no part of the ordinary business of commercial corporations, and, a fortiori, still less so of noncommercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are ultra vires, whether in the indirect form of going on accommodation bills, or otherwise becoming liable for the debts of others." *Green's Brice, Ultra Vires*, 252.

¹²¹ *National Park Bank v. German-American M. W. & S. Co.*, supra; *National Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *Ex parte Estabrook*, 2 Low. 547, Fed. Cas. No. 4,534; *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, 30 C. C. A. 409; *Preston v. Northwestern Cereal Co.*, 67 Neb. 45, 93 N. W. 136. See *National Bank v. John G. Mattingly & Sons*, 33 S. W. 415, 18 Ky. Law Rep. 425, where recovery was allowed on accommodation paper under peculiar circumstances. A corporation can execute accommodation paper with the consent of its stockholders. *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303; *Murphy v. Arkansas & L. Land & I. Co. (C. C.)* 97 Fed. 723. Contra, *Steiner v. Steiner Land & L. Co.*, 120 Ala. 128, 26 So. 494; And see *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, 30 C. C. A. 409; *Perkins v. Trinity Realty Co. (N. J. Ch.)* 61 Atl. 167.

¹²² *National Park Bank v. German-American M. W. & S. Co.*, supra.

¹²³ *Post*, p. 174.

¹²⁴ *National Bank of Commerce v. Allen*, 90 Fed. 545, 33 C. C. A. 169; *Lake Street El. R. Co. v. Carmichael*, 184 Ill. 348, 56 N. E. 872. Under the implied power which a corporation has to make such contracts as are necessary and usual as a means of accomplishing the purposes of its creation, it has been held that a corporation dealing in lumber may become surety on a building contractor's bond in order to get his business. *Wheeler, Osgood & Co. v.*

purpose of disposing of bonds issued to it by a municipal corporation in payment of subscriptions to its stock, may guaranty their payment.¹²⁵ So, where one railroad company makes an authorized lease of its road to another, the lessee may, as part of the consideration for the contract, guaranty the payment of bonds issued by the lessor.¹²⁶ And a railroad company, which has power by its charter to issue its own bonds, has power to guaranty the bonds of another railroad company, which it has taken in payment of a debt due it, and which it sells or transfers in payment of its own debt; the guaranty being given to enable it to dispose of the bonds to better advantage.¹²⁷ And corporations holding negotiable paper may indorse the same for the purpose of negotiating it.¹²⁸

Contracts of Partnership.

A corporation has no power to enter into a contract of partnership, unless the power is expressly conferred upon it. The power will not be implied, for the manner in which the business of a corporation is conducted is inconsistent with such a contract.¹²⁹ As was said in

Everett Land Co., 14 Wash. 630, 45 Pac. 316; G. F. Wittmer Lumber Co. v. Rice, 23 Ind. App. 586, 55 N. E. 868; Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543; Interior Woodwork Co. v. Prasser, 108 Wis. 557, 84 N. W. 833. Contra, In re S. P. Smith Lumber Co. (D. C.) 132 Fed. 620. A brewing corporation may guaranty the rent of a customer. Winterfield v. Cream City Brewing Co., 96 Wis. 239, 71 N. W. 101. It may become surety on a liquor bond. Horst v. Lewis (Neb.) 98 N. W. 1046, 103 N. W. 460. Where a manufacturing and mercantile corporation has sold goods on credit to a hotel keeper, whose only means of payment is derived from profits in such business, it has implied power to pledge its credit to assist him to borrow money to enable him to continue his business. Hess v. W. & J. Sloane, 66 App. Div. 522, 73 N. Y. Supp. 313, affirmed 173 N. Y. 616, 66 N. E. 1110.

¹²⁵ Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. Ed. 117.

¹²⁶ Low v. Railroad Co., 52 Cal. 53, 28 Am. Rep. 629.

¹²⁷ Rogers L. & M. Works v. Southern Railroad Ass'n (C. C.) 34 Fed. 278. And see Arnot v. Railway Co., 67 N. Y. 315; Ellerman v. Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287; Marbury v. Land Co., 10 C. C. A. 393, 62 Fed. 335; Central Trust Co. v. Columbus, H. V. & T. Ry. Co. (C. C.) 87 Fed. 815; Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603. When the charter of a land company gave it power to acquire mining and timber lands, to take the ore and timber therefrom and manufacture them, and to acquire rights of way "to export" its products, with all powers necessary to the full enjoyment of the powers granted, and authorized it, in furtherance of those powers, to consolidate with any railroad company, it had power to acquire stock of a railroad company, and to guaranty its bonds and the dividends on its preferred stock, in order to secure the construction of a railroad. Marbury v. Land Co., supra.

¹²⁸ Bank of Genesee v. Patchin Bank, 13 N. Y. 309.

¹²⁹ Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681, 1 Cumming, Cas. Priv. Corp. 399; Mallory v. Oil Works, 86 Tenn. 598, 8 S. W.

a Massachusetts case, in reference to a manufacturing corporation which had undertaken to form a partnership: "There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership, each member binds the society as a principal. If, then, this corporation can enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property."¹⁸⁰ An agreement among a number of corporations, or between corporations and natural persons, engaged in manufacture, to select a committee composed of representatives from each, and to turn over to such committee the property and machinery of each, to be managed and operated by the committee for the common benefit, the profits and losses to be shared in equal proportions, and the arrangement to last for a specified time, is a contract of partnership, and therefore within this rule.¹⁸¹

The rule that corporations cannot enter into a partnership agreement does not prevent a corporation and a natural person, or two corporations, from entering into a joint contract, or taking property as tenants in common. Thus, two corporations, or a corpo-

396; *Central R. & B. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Marine Bank v. Ogden*, 29 Ill. 248. Cf. *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471, 2 Cumming, Cas. Priv. Corp. 88, where a corporation was held liable to third persons as a partner. And see *Allen v. Woonsocket Co.*, 11 R. I. 288, 2 Cumming, Cas. Priv. Corp. 91. If a corporation does enter into and carry out a contract of partnership, and receives more than its share of the profits, it has been held that it cannot defeat an action by the other party to recover his share on the plea of *ultra vires*. *Standard Oil Co. v. Scofield*, 16 Abb. N. C. (N. Y.) 372, 2 Cumming, Cas. Priv. Corp. 95; *Boyd v. American Carbon-Black Co.*, 182 Pa. 206, 37 Atl. 937; *Geurinck v. Alcott*, 66 Ohio St. 94, 63 N. E. 714; *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462, 66 C. C. A. 336. A corporation cannot sue for breach of a contract of partnership between it and individuals to recover as damages the probable profits which would have accrued, had the partnership been continued until the time fixed for its termination. *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 40 S. W. 837.

¹⁸⁰ *Whittenton Mills v. Upton*, *supra*. But it has been held that it is not *ultra vires* for a corporation to enter into a contract with an individual to engage in a certain venture, and share profits and losses, where all the management of the enterprise is intrusted to the corporation. *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855.

¹⁸¹ *Mallory v. Oil Works*, *supra*. And see *Burke v. Concord R. Co.*, 61 N. H. 160.

ration and a natural person, may be mortgagees in the same mortgage, or obligees in the same bond, or promisees in the same note, and, in like manner, they may execute a joint note, bond, or other contract. So, where money is deposited in bank in the joint names of two corporations, they are tenants in common or joint creditors, and may maintain a joint action to enforce their rights.¹³² Nor does the rule that a corporation cannot enter into a partnership prevent a railroad company from entering into a traffic agreement with connecting carriers for the transportation of freight and passengers over the connecting lines and for a dividing of the receipts therefrom.¹³³

Contracts to Prevent Competition—Trusts—Pools.

For the same reason that a corporation is without power, unless it be specially conferred, to enter into a partnership,¹³⁴ it is without power to enter into a combination with other corporations through the medium of a trust for the purpose of bringing the business and property under one management. Such a trust agreement, whether effected by formal corporation or by the collective action and agency of the stockholders, is ultra vires; and, when its effect is to stifle competition and create a monopoly, the agreement is illegal and void on the ground of public policy.¹³⁵ Thus, in the case of the so-called "Sugar Trust," it was held that where a corporation by the collective action of its stockholders enters into a partnership of independent corporations through the medium of a trust, disregarding all statutory restraints as to the consolidation of corporations, it is guilty

¹³² *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412, 2 Cumming, Cas. Priv. Corp. 87; *Marine Bank v. Ogden*, 29 Ill. 248. Where a corporation and another have assumed to enter into a partnership, and jointly transacted business together, they may recover, by reason of their joint interest, upon obligations made to them in their partnership name, irrespective of their partnership rights and duties inter se, or the power of the corporation to enter into a partnership. *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249. Where several creditors of an insolvent, one a corporation, formed a partnership to take the insolvent's stock and dispose of it to the best advantage, the arrangement was not so illegal as to warrant dismissal of a bill for an accounting. *Kelley v. Biddle*, 180 Mass. 147, 61 N. E. 821.

¹³³ *Sussex R. Co. v. Morris & E. R. Co.*, 19 N. J. Eq. 13; *Morris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542; *Elkins v. Camden & A. Ry. Co.*, 36 N. J. Eq. 241; *Stewart v. Erie & W. Transportation Co.*, 17 Minn. 372 (Gil. 348); *Chicago, P. & St. L. Ry. Co. v. Ayres*, 140 Ill. 644, 30 N. E. 687; *Chicago & A. R. Co. v. Mulford*, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; *Post v. Southern Ry. Co.*, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

¹³⁴ Ante, p. 140.

¹³⁵ *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 24 N. E. 834; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.

of a violation of its charter, and such failure to perform its corporate duties as renders it liable to dissolution.¹⁸⁶ "It is quite clear," said the court, "that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the state a gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self control. * * *

But graver still is the illegal action substituted for the conduct which the state has a right to expect and require. It has helped to create an anomalous trust, which is in substance and effect a partnership of twenty separate corporations. The state permits in many ways an aggregation of capital, but, mindful of the possible dangers to the people, overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission, and grows out of its corporate grants." As we have seen, a corporation formed for the purpose of preventing competition and creating a monopoly is illegal, as contrary to public policy.¹⁸⁷ And, upon the same principle, any agreement between corporations which has for its object the creation of a monopoly by stifling competition or otherwise is illegal and void.¹⁸⁸ Such agreements, whether between corporations or individuals, are in many jurisdictions declared illegal by statute.¹⁸⁹

¹⁸⁶ *People v. North River Sugar-Refining Co.*, *supra*.

¹⁸⁷ *Ante*, p. 62.

¹⁸⁸ *Chicago Gaslight Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; *State v. Portland Natural Gas Co.* 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *Brunswick Gaslight Co. v. United Gas, F. & L. Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 39 Atl. 923; *Id.*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *post*, p. 187.

¹⁸⁹ Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. Under the act a contract between manufacturers of iron pipe in different states, whereby free competition was restrained, and prices determined by a committee, was held unlawful. *Addyston Pipe & S. Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. Cf. *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. A combination of stockholders in two competing railway companies to form a holding corporation which should ac-

Although traffic agreements between connecting carriers which have not for their object the prevention of competition are legal,¹⁴⁰ pooling arrangements, or other contracts between railway companies owning competing lines, the object of which is to prevent competition, in the absence of express authority, are illegal and ultra vires.¹⁴¹ It was held in New Hampshire, however, that a contract between competing railway companies made for the purpose of preventing competition, but not for the purpose of raising the prices of transportation above a reasonable standard, is not void as against public policy.¹⁴² Under the act of congress of July 2, 1890, declaring illegal "every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations,"¹⁴³ it was held that the prohibited contracts include all contracts or combinations in restraint of trade or commerce, whether the restraint imposed is reasonable or unreasonable, and that the act applies to a contract between competing carriers by rail forming an association for maintaining and regulating rates of transportation.¹⁴⁴ A contract by a railway corporation to give exclusive or special privileges over its road to shippers is illegal and void.¹⁴⁵

quire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, violates the act. *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. Where such holding company was adjudged illegal, a stockholder could not enforce return of the specific stock transferred by him to the company, since he was himself a conspirator. *Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274, 57 Atl. 876.

¹⁴⁰ Ante, p. 128.

¹⁴¹ *Hartford & N. H. R. Co. v. New York & N. H. R. Co.*, 3 Rob. (N. Y.) 411; *Stewart v. Erie & W. Trans. Co.*, 17 Minn. 372 (Gil. 348); *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970, 6 South. 888, 17 Am. St. Rep. 445. A pooling arrangement between rival railroad companies, fixing freight rates, is prima facie illegal. *Cleveland, C., C. & I. Ry. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

¹⁴² *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582. And see *Post v. Southern Ry. Co.*, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

¹⁴³ See note 139, supra.

¹⁴⁴ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint-Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

¹⁴⁵ *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law, 407, 13 Am. Rep. 457; *Id.*, 37 N. J. Law, 531, 18 Am. Rep. 754; *Scofield v. Lake Shore & M. S. Ry. Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

Power to Acquire and Hold Stock in Another Corporation.

Although it appears to be otherwise in England¹⁴⁶ and in some of our states,¹⁴⁷ it is generally held in this country that a corporation has no power to subscribe for or to purchase stock in another corporation, unless such power is expressly given in its charter or is reasonably implied in it.¹⁴⁸ "Were this not so," it has been said,

¹⁴⁶ *In re Asiatic Banking Corp.*, L. R. 4 Ch. App. 252, 1 Cumming, Cas. Priv. Corp. 359, W. D. Smith, Cas. Corp. 21, Shep. Cas. Corp. 113; *In re Barned's Banking Co.*, L. R. 3 Ch. App. 105.

¹⁴⁷ *Booth v. Robinson*, 55 Md. 419; *Davis v. United States Electric Power & Light Co.*, 77 Md. 35, 25 Atl. 982; *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140; *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147, 64 N. W. 782, 59 Am. St. Rep. 362; *White v. G. W. Marquardt & Sons*, 105 Iowa, 145, 74 N. W. 930; *Traer v. Lucas Prospecting Co.*, 124 Iowa, 107, 99 N. W. 290; *Joseph Bancroft & Sons v. Bloede*, 106 Fed. 398, 45 C. C. A. 354, 52 L. R. A. 734.

¹⁴⁸ *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9, 1 Cumming, Cas. Priv. Corp. 343; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594, 1 Cumming, Cas. Priv. Corp. 348, W. D. Smith, Cas. Corp. 26; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14, 1 Cumming, Cas. Priv. Corp. 293; *Pearson v. Concord R. Corp.*, 62 N. H. 537, 13 Am. St. Rep. 590; *Mechanics' & Workingmen's Mut. Sav. Bank v. Meriden Ag. Co.*, 24 Conn. 159; *Milbank v. Railroad Co.*, 64 How. Prac. (N. Y.) 20, 1 Cumming, Cas. Priv. Corp. 353; *Byrne v. Manufacturing Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252; *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *People v. Pullman Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; *State v. Newman*, 51 La. Ann. 833, 25 South. 408, 72 Am. St. Rep. 476; *McAlester Mfg. Co. v. Florence Cotton & J. Co.*, 128 Ala. 240, 30 South. 632; *Nebraska Shirt Co. v. Horton (Neb.)* 93 N. W. 225; *Lester & Haltom v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *California Nat. Bank v. Kennedy*, 167 U. S. 632, 17 Sup. Ct. 831, 42 L. Ed. 198; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007; *De La Vergne R. M. Co. v. German Savings Inst.*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65. A corporation cannot organize a subordinate corporation. *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290. A foreign corporation cannot be allowed to purchase the stock of, and so control, a domestic corporation. *Buckeye Marble & Freestone Co. v. Harvey*, *supra*. The purchase by a national bank of the stock of another corporation is ultra vires, and the bank is not estopped to deny its liability for the debts of such corporation, though it has received dividends. *California Nat. Bank v. Kennedy*, *supra*. See, also, *First Nat. Bank v. Hawkins*, *supra*; *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206. But see *White v. Marquardt & Sons*, 105 Iowa, 145, 74 N. W. 930; *Tourtlot v. Whitehed*, 9 N. D. 407, 84 N. W. 8; *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85. A corporation may promote a new corporation to conduct a similar business, where it is authorized, in addition to manufactur-

"one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing such shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock."¹⁴⁹ The power to purchase stock in other corporations may, of course, be expressly granted,¹⁵⁰ and it may be implied when it is a necessary or reasonable means of carrying out the powers conferred upon. Thus a power to acquire stock in another company may be implied from the power to consolidate with it, as a proper step towards consolidation or as necessarily included in the grant of so large a power.¹⁵¹ But power to invest in the shares of another corporation is not to be implied because both are engaged in a similar kind of business.¹⁵²

ing, to acquire stocks of corporations and vote thereon. *Rubino v. Pressed Steel Car Co.* (N. J. Ch.) 53 Atl. 1050. In such case it may organize and hold stocks of corporations in other states. *Dittman v. Distilling Co., of America*, 64 N. J. Eq. 537, 54 Atl. 570. Cf. *Coler v. Tacoma Ry. Co.*, 64 N. J. Eq. 117, 54 Atl. 413. Though the articles express a power to own stock in other corporations, in the absence of statute or authority to do so, such stock cannot be voted at stockholders' meetings. *Parsons v. Tacoma Smelting & R. Co.*, 25 Wash. 492, 65 Pac. 765.

¹⁴⁹ *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594, 1 Cumming, Cas. Priv. Corp. 348, W. D. Smith, Cas. Corp. 26.

¹⁵⁰ See *In re Buffalo, N. Y. & E. R. Co.* (Sup.) 37 N. Y. Supp. 1048; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Trust Co. v. State*, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520; *Joseph Bancroft & Sons v. Bloede*, 106 Fed. 396, 45 C. C. A. 354, 52 L. R. A. 734. Cf. *Anglo-American Mtg. & A. Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89. Although a New Jersey corporation may hold stock in other corporations, it being unlawful under the constitution and decisions in Washington for any corporation to hold stock and exercise the rights of stockholders in a corporation of that state, the New Jersey courts will restrain an arrangement, on bill filed by a stockholder in a New Jersey corporation, whereby it was to transfer its property and franchises to a Washington corporation and the latter was to issue its stock therefor. *Coler v. Tacoma Ry. & P. Co.*, 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. Rep. 786.

¹⁵¹ *Todd v. Kentucky Union Land Co.* (C. C.) 57 Fed. 47; *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, 10 C. C. A. 393; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433, 22 C. C. A. 378; *MacGinniss v. Boston & M. Consol. C. & S. Min. Co.*, 29 Mont. 428, 75 Pac. 89.

¹⁵² See *Pearson v. Concord R. Co.*, 62 N. H. 537, 13 Am. St. Rep. 590; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319.

The rule that a corporation has not implied power to acquire stock in another corporation is subject to some exceptions. A corporation may in good faith take and hold stock in another corporation to secure a debt which is due it, or in payment of a debt,¹⁵³ and it may acquire stock by levy and sale.¹⁵⁴ A corporation having power to lend money may accept stock in another corporation as security for a loan, and by enforcement of its rights as pledgee may become the owner of the stock.¹⁵⁵ Although dealing in stocks is not expressly prohibited by the national banking act, such prohibition is implied from a failure to grant the power;¹⁵⁶ but a national bank, in the honest exercise of the power to compromise a doubtful debt owing to it, may take stocks with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss;¹⁵⁷ and a national bank may accept stock as security for a loan.¹⁵⁸

It has been held that a private corporation, for the purpose of retiring from business and with the consent of its stockholders, may sell all its property to another corporation and take stock in the latter in payment, for distribution among the stockholders;¹⁵⁹ but an agreement by which a corporation is to sell its property and good will to another corporation and restrict itself to holding stock in the latter, through which its proper business is to be carried on, is *ultra vires*.¹⁶⁰

¹⁵³ *Talmage v. Pell*, 7 N. Y. 328; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 1 Cumming, Cas. Priv. Corp. 368; *Tourtelot v. Whitehead*, 9 N. D. 407, 84 N. W. 8; *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa, 591, 103 N. W. 958.

¹⁵⁴ *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

¹⁵⁵ *National Bank v. Case*, 99 U. S. 633, 25 L. Ed. 448; *Kennedy v. California Sav. Bk.* 101 Cal. 495, 35 Pac. 1039, 40 Am. St. Rep. 69. But see *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594.

¹⁵⁶ *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, Cumming, Cas. Priv. Corp. 368.

¹⁵⁷ *Id.*

¹⁵⁸ *National Bank v. Case*, *supra*.

¹⁵⁹ *Holmes & Griggs Manuf'g Co. v. Holmes & W. Metal Co.*, 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448, 2 Cumming, Cas. Priv. Corp. 85. And see *Treadwell v. Manufacturing Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490; *Pinkus v. Minneapolis Linen Mills Co.*, 65 Minn. 40, 67 N. W. 643; *Metcalf v. American School Furniture Co. (C. C.)* 122 Fed. 115. A corporation, though authorized to take stock in other corporations, may not, without the consent of all its stockholders, transfer all its property to another corporation and take in payment the stock of such corporation. *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 South. 513; *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 20 South. 981, 59 Am. St. Rep. 105.

¹⁶⁰ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 789, 19 C. C. A. 108, 31 L. R. A. 415.

Where a corporation subscribes and pays for stock in another corporation, but is without power to do so, it may collect the dividends thereon and sell and dispose of the stock, but may not vote thereon.¹⁶¹

Power of Corporation to Acquire and Hold its Own Stock.

In England it is held that, unless expressly authorized, a corporation has no power to purchase its own stock, either for the purpose of selling or reissuing it, or for the purpose of holding or retiring it, as such a transaction is considered foreign to the purposes of a corporation, and an illegitimate employment of its capital.¹⁶² The same rule prevails in some jurisdictions in this country.¹⁶³ In support of this doctrine it is urged that a purchase of shares, if made out of the capital, effects a reduction of the fund on which creditors have a right to rely, and that in any case, even if made from the net profits, it reduces the number of stockholders, to whom the creditors may have a right ultimately to look for payment, to the injury of the creditors, as well as of the other stockholders, who may be called upon to pay the demands of creditors.¹⁶⁴ Moreover, it has been said, it "tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging the market on the part of the corporation itself."¹⁶⁵

The doctrine does not prevent a corporation from taking its own stock as security for, or in payment of, a debt due to it.¹⁶⁶ The national banking act expressly prohibits a national bank from making any loan or discount on the security of the shares of its own capital stock, or from becoming the purchaser or holder thereof, unless such

¹⁶¹ *State v. Newman*, 51 La. Ann. 833, 25 South. 408, 72 Am. St. Rep. 476; *Bigbee & W. R. Packet Co. v. Moore*, 121 Ala. 379, 25 South. 602.

¹⁶² *Trevor v. Whitworth*, L. R. 12 App. Cas. 409, 1 Cummings, Cas. Priv. Corp. 384. See, also, *Belery v. Rovland & M. S. S. Co.* [1902] 2 Oh. 14.

¹⁶³ *Coppin v. Railroad Co.*, 38 Ohio St. 275, 43 Am. Rep. 425, 1 Cumming, Cas. Priv. Corp. 393, W. D. Smith, Cas. Corp. 29, Shep. Cas. Corp. 121; *State v. Oberlin Bldg. & Loan Ass'n*, 35 Ohio St. 258, 1 Cumming, Cas. Priv. Corp. 566. And see *Hamor v. Taylor-Rice Engineering Co. (C. C.)* 84 Fed. 392; *Herring v. Ruskin Co-Op. Ass'n (Tenn. Ch. App.)* 52 S. W. 327; *Adams & Westlake Co. v. Deyette*, 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751.

¹⁶⁴ See *Trevor v. Whitworth*, supra; *Coppin v. Greenlees & R. Co.*, supra; 18 Harv. L. R. 531.

¹⁶⁵ *Green's Brice, Ultra Vires*, 95.

¹⁶⁶ *Taylor v. Exporting Co.*, 6 Ohio, 177; *Coppin v. Railroad Co.*, supra; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679; *Ex parte Holmes*, 5 Oow. (N. Y.) 426; *City Bank v. Bruce*, 17 N. Y. 507; *State v. Smith*, 48 Vt. 266, 284; *Williams v. Manufacturing Co.*, 3 Md. Ch. 418, 452; *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558; *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033.

security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and it is further provided that stock so purchased or acquired shall, within six months from the date of its purchase, be sold or disposed of at public or private sale, or, in default thereof, a receiver may be appointed to close up the business.¹⁶⁷

In many jurisdictions, however, the doctrine that a corporation cannot purchase its own stock is not recognized; but, on the contrary, it is the prevailing doctrine in the United States that, in the absence of express restrictions, a corporation may purchase its own stock, provided the purchase be not to the prejudice of its creditors.¹⁶⁸ In case of purchase by the corporation, the stock does not merge, but may be reissued.¹⁶⁹ The power may not be exercised to the injury of the stockholders¹⁷⁰ or of creditors of the corporation, and, if

¹⁶⁷ *First Nat. Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592, 1 Cumming, Cas. Priv. Corp. 397. If the fact that a national bank has made such prohibited loan can be urged against the validity of the transaction by any one except the government, it can be done only before the contract is executed and while the security is still subsisting in the hands of the bank. *First Nat. Bank v. Stewart*, supra.

¹⁶⁸ *Chicago, P. & S. W. R. Co. v. Town of Marseilles*, 84 Ill. 145, 643, 1 Cumming, Cas. Priv. Corp. 374, 377; *W. D. Smith, Cas. Corp.* 82, *Shep. Cas. Corp.* 118; *Clapp v. Peterson*, 104 Ill. 26; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; *City Bank v. Bruce*, 17 N. Y. 507; *Dupee v. Water Power Co.*, 114 Mass. 87; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Dock v. Schlichter-Jute Cordage Co.*, 167 Pa. 370, 31 Atl. 656; *Chapman v. Iron Clad Rheostat Co.*, 62 N. J. Law, 497, 41 Atl. 690; *Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140; *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa, 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387; *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Porter v. Plymouth Gold Min. Co.* 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569; *Joseph v. Raff*, 82 App. Div. 47, 84 N. Y. Supp. 546, affirmed 176 N. Y. 611, 68 N. E. 1118; *First Nat. Bank v. Salem Capital F. M. Co. (C. C.)* 39 Fed. 89; *Burnes v. Burnes (C. C.)* 132 Fed. 485. A sale of its stock by a corporation, with an option to the purchaser to return it and receive back his money, is valid. *Vent v. Duluth Spice Co.*, 64 Minn. 307, 67 N. W. 70. And see *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Fremont Carriage Mfg. Co. v. Thomson*, 65 Neb. 370, 91 N. W. 376.

¹⁶⁹ *State v. Smith*, 48 Vt. 266; *Commonwealth v. Boston & A. R. Co.*, 142 Mass. 146, 7 N. E. 716.

¹⁷⁰ *Lowe v. Pioneer Threshing Co. (C. C.)* 70 Fed. 646; *Price v. Pine Mountain Iron & C. Co. (Ky.)* 32 S. W. 267; *Augsburg Land & I. Co. v. Pepper*, 95 Va. 92, 27 S. E. 807. Cf. *Berger v. United States Steel Corp.*, 63 N. J. Eq. 809, 53 Atl. 68; *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460; *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa, 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387.

so exercised, a court of equity will grant relief.¹⁷¹ If the purchase would render the corporation insolvent, it will not be permitted.¹⁷² But, even if the corporation be solvent and act in good faith, the purchase may be impeached by creditors who are injured thereby. The rule has been put upon the ground that the capital stock of a corporation is a "fund set apart for the payment of its debts,"¹⁷³ and that property paid by a corporation in the purchase of its stock may be followed by an injured creditor into the hands of any one but a bona fide purchaser for value.¹⁷⁴ But it is not necessary to resort to the trust-fund doctrine.¹⁷⁵ "The courts that have most distinctly answered and upheld this doctrine [that a corporation may purchase its own stock] have definitely held to and rigidly enforced the collateral principle that a corporation cannot become such purchaser when it results in a fraud upon the rights of or injury or loss to the creditors of the corporation. The danger of fraud being perpetrated upon, or injury or loss resulting, to creditors, was one of the potent reasons moving the courts of England to establish and adhere to the rule that a corporation cannot become a purchaser of its own shares of stock. In view of the contrary doctrine obtaining in most of the courts of this country, the safety of the creditors of a corporation lies in the reorganization and enforcement of the collateral principal above set forth."¹⁷⁶

Power to Consolidate.

A corporation has no power to consolidate with another corporation, unless the power is expressly conferred upon it.¹⁷⁷ This is because the

¹⁷¹ *Clapp v. Peterson*, 104 Ill. 26; *Com. Nat. Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; *Adams & Westlake Co. v. Deyette*, 5 S. D. 418, 59 N. W. 214, 49 Am. St. Rep. 887, s. c. 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751; *Hall v. Henderson*, 126 Ala. 449, 28 South. 531. And see cases *supra*, note 168.

¹⁷² *Burnes v. Burnes* (C. C.) 182 Fed. 485.

¹⁷³ *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, 63 N. E. 634.

¹⁷⁴ *Clapp v. Peterson*, 104 Ill. 26, 1 Cumming, Cas. Priv. Corp. 380.

¹⁷⁵ *Post*, p. 526.

¹⁷⁶ *Burnes v. Burnes*, *supra*.

¹⁷⁷ *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184; *Ferguson v. Meredith*, 1 Wall. (U. S.) 25; 17 L. Ed. 604; *Kavanaugh v. Omaha L. Ass'n* (C. C.) 84 Fed. 295; *Cole v. Mercantile Trust Co.*, 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; *East Line, etc., R. Co. v. State*, 75 Tex. 434, 12 S. W. 690; *Topeka Paper Co. v. Oklahoma Pub. Co.*, 7 Okl. 220, 54 Pac. 455; *Overstreet v. Citizens' Bank*, 12 Okl. 383, 72 Pac. 379. An attempted consolidation of a domestic and a foreign railroad company, in the absence of statutory authorization, does not create a corporation *de facto*. *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153. Cf. *Shadford v. Detroit, Y. & A. A. R. Co.*, 130 Mich. 300, 89 N. W. 960. Power to a railroad company to "unite" its road with another does not authorize con-

effect of the consolidation is ordinarily to create a new and distinct corporation, to which the consent of the state is necessary.¹⁷⁸ The consent of the state may be expressed in the charter,¹⁷⁹ or in a general enabling act,¹⁸⁰ or by legislative ratification.¹⁸¹ The power must be conferred upon each of the consolidating corporations;¹⁸² but it has been held that power given to one railroad company to consolidate with any other company authorized any other company to consolidate with it.¹⁸³

Unless the power to consolidate is contained in the charter,¹⁸⁴ a consolidation can be effected, notwithstanding subsequent legislative authority, only by unanimous consent of the stockholders.¹⁸⁵ But, under a reserved power on the part of the legislature to alter or amend the charter, the legislature may authorize a consolidation without such consent.¹⁸⁶

solidation. *Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

¹⁷⁸ Ante, p. 80.

¹⁷⁹ *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, 22 L. Ed. 83. The grant of power to consolidate may be withdrawn before a consolidation has taken place. *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; *Louisville & N. A. R. Co. v. Commonwealth of Kentucky*, supra.

¹⁸⁰ *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455. A consolidation under a statute which authorizes the consolidation of "any two corporations * * * whose objects and business are, in general, of the same nature," is not invalidated by the fact that one of the constituent corporations was itself created by a prior consolidation. *Jones v. Missouri-Edison Electric Co.* (C. C.) 135 Fed. 153. See, also, *Birmingham Ry., L. & P. Co. v. Enslen*, 144 Ala. 343, 39 So. 74; *Mayfield v. Alton Ry., G. & E. Co.*, 198 Ill. 528, 65 N. E. 100.

¹⁸¹ *Mead v. New York, H. & M. R. Co.*, 45 Conn. 199.

¹⁸² *Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

¹⁸³ *In re Prospect Park, etc., R. Co.*, 67 N. Y. 371. But see *Morrill v. Smith County*, 89 Tex. 529, 36 S. W. 56.

¹⁸⁴ *Railroad Co. v. Brown*, 26 Ohio St. 223; *Nugent v. Putnam Co.*, 19 Wall. (U. S.) 241, 22 L. Ed. 83; *Mayfield v. Alton Ry., Gas & E. Co.*, 198 Ill. 528, 65 N. E. 100.

¹⁸⁵ *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 17 L. Ed. 604; *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455; *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453; *Botts v. Simpsonville & B. C. Turnpike Co.*, 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594; *Deposit Bank v. Barrett* (Ky.) 13 S. W. 337. As to the remedies of dissenting stockholders, see *Tanner v. Lindell Ry. Co.*, 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534.

¹⁸⁶ *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, 22 L. Ed. 83; *Hale v. Oheshire R. Co.* 161 Mass. 443, 37 N. E. 307; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *McKee v. Chautauqua Assembly*, 130 Fed. 537, 65 C. C. A. 8; post, p. 212.

The effect of the consolidation is ordinarily to create a new corporation and to work a dissolution of the consolidating corporations.¹⁸⁷

One corporation may, however, absorb another by purchasing the other's assets, stock and franchises, and issuing its own shares to the shareholders of the other, continuing its own existence with enlarged powers.¹⁸⁸ Whether the consolidation works a dissolution of the constituent corporations depends upon the statute authorizing it.¹⁸⁹ So, too, the powers of the consolidated corporation depend upon the statute authorizing the consolidation.¹⁹⁰ As a rule, the consolidated corporation succeeds to the rights and franchises of the constituent corporations,¹⁹¹ as, for example, the right to acquire property under the power of eminent domain,¹⁹² a right to occupy the streets,¹⁹³ or an exclusive right to supply gas.¹⁹⁴ By virtue of the consolidation the

¹⁸⁷ *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 17 L. Ed. 604; *Railroad Co. v. Georgia*, 98 U. S. 361, 25 L. Ed. 185; *Yazoo & M. V. R. Co. v. Adams*, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Fee v. New Orleans Gas L. Co.*, 35 La. Ann. 413; *Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, 60 L. R. A. 33; *Railway Co. v. Smith*, 40 Kan. 192, 19 Pac. 636; *Wagner v. Atchison, T. & S. F. R. Co.*, 9 Kan. App. 661, 58 Pac. 1018; *Rio Grande W. Ry. Co. v. Telluride Power Trans. Co.*, 16 Utah, 125, 51 Pac. 147; *Jones v. Missouri-Edison Electric Co. (C. C.)* 135 Fed. 153.

¹⁸⁸ *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757; *Chicago, S. F. & C. Co. v. Ashling*, 160 Ill. 373, 43 N. E. 373; *Pingree v. Michigan Cent. R. Co.*, 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

¹⁸⁹ *Keokuk & W. R. Co. v. State*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; *Houck v. Lesueur*, 145 Mo. 322, 46 S. W. 1075. And see cases cited in two preceding notes.

¹⁹⁰ *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Shaw v. City of Covington*, 194 U. S. 593, 24 Sup. Ct. 754, 48 L. Ed. 1131.

¹⁹¹ *Zimmer v. State*, 30 Ark. 677; *Miller v. Lancaster*, 5 Cold. (Tenn.) 514; *Mead v. New York, H., etc., R. Co.*, 45 Conn. 199; *Fisher v. New York, C. & H. R. R. Co.*, 46 N. Y. 644; *Covington Gaslight Co. v. Covington (Ky.)* 58 S. W. 805; *Consolidated Gas Co. v. Baltimore County*, 98 Md. 689, 57 Atl. 29. That the consolidated company succeeds to the right of one of the constituent companies to receive bonds which a municipal corporation is authorized to issue to it, see *Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. Ed. 359. Cf. *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747. See 10 Cyc. 305. That the consolidated company succeeds to the right of one of the constituent companies to receive bonds voted by a municipal corporation to aid in building its road, see *Bates County v. Winters*, 112 U. S. 325, 5 Sup. Ct. 157, 28 L. Ed. 744. As to exemption from taxation, post, p. 542.

¹⁹² *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Trester v. Missouri Pac. Ry. Co.*, 33 Neb. 171, 49 N. W. 1110. And see *Abbott v. New York & N. E. R. Co.* 145 Mass. 459, 15 N. E. 91.

¹⁹³ *Africa v. Board of Mayor, etc. (C. C.)* 70 Fed. 729.

¹⁹⁴ *New Orleans Gaslight Co. v. Louisiana Light & H. P. & M. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. Compare *Shaw v. City of Covington*, 194 U. S. 593, 24 Sup. Ct. 754, 48 L. Ed. 1131, where, in view of the provisions of

title of the constituent corporations to real property vests in the new corporation,¹⁹⁵ and choses in action of the constituent companies are assigned to it.¹⁹⁶ As a rule the new corporation becomes liable for the debts and liabilities of the constituent companies.¹⁹⁷

Presumption.

The presumption being in favor of right doing, the contracts of a corporation will be presumed to be within the legitimate scope and purpose of the corporation until the contrary appears, and the burden of showing the contrary rests upon the party who objects.¹⁹⁸ The presumption is that a conveyance to a corporation authorized to acquire land for some purposes only was taken by it for a lawful purpose. If the purpose was in fact illegal, the fact must be affirmatively shown.¹⁹⁹

the consolidation statute, it was held that an exclusive privilege to conduct an electric light, heat, or power business, which had been conferred upon one of the constituent corporations, was not continued in the consolidated corporation.

¹⁹⁵ *Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. 560; *Day v. New York S. & W. R. Co.*, 58 N. J. Law, 677, 34 Atl. 1081; *Greene v. Woodland Ave., etc., R. Co.*, 62 Ohio St. 67, 56 N. E. 642.

¹⁹⁶ *University of Vermont v. Baxter*, 42 Vt. 99; *Bank of Long Island v. Young*, 101 App. Div. 88, 91 N. Y. Supp. 849.

¹⁹⁷ Post, p. 542.

¹⁹⁸ *Downing v. Road Co.*, 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148, W. D. Smith, Cas. Corp. 129, Shep. Cas. Corp. 75; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, 1 Cumming, Cas. Priv. Corp. 164, W. D. Smith, Cas. Corp. 132, Shep. Cas. Corp. 70; *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Nelson v. Eaton*, 26 N. Y. 410; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372; *Ellerman v. Stock Yards Co.*, 49 N. J. Eq. 217, 23 Atl. 287.

¹⁹⁹ *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Regents of University of Michigan v. Detroit Young Men's Society*, 12 Mich. 138.

SAME—FORM AND MODE OF CORPORATE CONTRACTS.

58. It was at one time held that, save in a few cases, a corporation could not contract except under its corporate seal. It is now settled, however, that, except in so far as there may be express restrictions in its charter or in some statute, a corporation can contract by resolutions or by agents, and without a seal, in any case where a natural person could contract without a seal. And, like a natural person, it may be liable quasi ex contractu.
59. If the charter of a corporation, or some statute, prescribes a particular mode or form for entering into contracts, that mode and form must be followed. But—
- (a) The statute must be mandatory, and not merely directory.
 - (b) The statute will not be so construed as to prevent recovery, where the contract has been executed and consideration furnished by one of the parties, unless such a legislative intent is clear.
60. A seal need not be affixed by the officers of a corporation. It is sufficient if they direct it to be done by another, or adopt a seal affixed by another.
61. A seal does not prevent inquiry into the consideration for a corporate contract for the purpose of determining whether it is ultra vires.

Under the old common law, the general rule was that a corporation could only manifest its intention, and so enter into contracts, by the use of its corporate seal.²⁰⁰ To this rule there were some exceptions, based upon necessity or convenience. Whenever to hold the general rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, it was allowed to contract without seal. The retainer of an inferior servant,²⁰¹ and the doing of acts frequently recurring or too insignificant to be worth the trouble of affixing the common seal, were established exceptions. In England a distinction between trading and nontrading corporations has become established,²⁰² and to-day

²⁰⁰ "A corporation," said Blackstone, "being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore speaks and acts only by its common seal. For, though the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole." 1 Bl. Comm. 475. See *Horn v. Ivy*, 1 Vent. 47; *East London Waterworks Co. v. Bailey*, 12 Moore, 532, 4 Bing. 283; *Dunston v. Coke Co.*, 3 Barn. & Adol. 125.

²⁰¹ See *Horn v. Ivy*, 1 Vent. 47.

²⁰² See *Church v. Imperial Gaslight & C. Co.*, 6 Ad. & E. 846; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815.

a trading corporation may accept bills of exchange or execute promissory notes,²⁰² and make other contracts in the direct course of their business,²⁰⁴ and may appoint agents by parol.²⁰⁵ In the United States the old rule requiring the use of the seal is no longer recognized to any extent, if at all.²⁰⁶ On the contrary, unless the charter or some statute provides otherwise, a corporation need only use a seal where an individual would be required to use one.²⁰⁷ In all cases where it is not so restricted, it may appoint or employ an attorney, agent, or servant by parol or by writing not under seal;²⁰⁸ and any contract made by him in writing not under seal, or orally, within the scope of his authority and of the legitimate purposes of the corporation, will be binding as the contract of the corporation.²⁰⁹ And a corporation may, like a natural person, ratify any contract made by

²⁰² *Church v. Imperial Gaslight & C. Co.*, *supra*; *ante*, p. 137.

²⁰⁴ *Morawetz, Corp.*, § 338.

²⁰⁵ *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617, affirming L. R. 3 C. P. 463; *Henderson v. Australia Steam Navigation Co.*, 5 El. & Bl. 409.

²⁰⁶ *Bank of Columbia v. Patterson's Adm'r*, 7 Oranch (U. S.) 299, 3 L. Ed. 351, 1 Cumming, Cas. Priv. Corp. 112, per Mr. Justice Story.

²⁰⁷ A bill in equity may be answered by a corporation only under seal. *R. Frank Williams Co. v. United States Baking Co.*, 86 Md. 475, 38 Atl. 990.

²⁰⁸ See *Topping v. Bickford*, 4 Allen (Mass.) 120, 1 Cumming, Cas. Priv. Corp. 118; *Bank of Columbia v. Patterson's Adm'r*, *supra*; *Goodwin v. Screw Co.*, 34 N. H. 378, 1 Cumming, Cas. Priv. Corp. 119; *Pixley v. Railroad Co.*, 33 Cal. 183, 91 Am. Dec. 623, 1 Cumming, Cas. Priv. Corp. 121; *Hand v. Coal Co.*, 143 Pa. 408, 22 Atl. 709; *Lathrop v. Bank*, 8 Dana (Ky.) 114, 33 Am. Dec. 481. "Authority in the agent may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals." *Sherman v. Fitch*, 98 Mass. 59. See, also, *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 86 C. C. A. 633. *Flaherty v. Atlantic Lumber Co.*, 58 N. J. Eq. 467, 44 Atl. 186; *Brown v. British & Am. Mortg. Co.*, 86 Miss. 388, 38 South. 312. The seal of a corporation is not necessary to the validity of a power of attorney to confess judgment. *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902.

²⁰⁹ *Bank of Columbia v. Patterson's Adm'r*, *supra*. And see *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Fleckner v. Bank*, 8 Wheat. (U. S.) 338, 357, 5 L. Ed. 631. *Australian Royal Mail Steam Nav. Co. v. Marzetti*, 32 Eng. Law & Eq. 572; *Muscatine Water Co. v. Muscatine Lumber Co.*, 85 Iowa, 112, 52 N. W. 108, 39 Am. St. Rep. 284; *Regents of University of Michigan v. Detroit Young Men's Soc.*, 12 Mich. 138; *City of Selma v. Mullen*, 46 Ala. 411; *Board of Education of Illinois v. Greenbaum*, 39 Ill. 609; *Town of New Athens v. Thomas*, 82 Ill. 259; *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146; *Christian Church of Wolcott v. Johnson*, 53 Ind. 273; *Fowler v. Bell* (Tex. Civ. App.) 35 S. W. 822; *Allen v. City of Portland*, 35 Ore. 420, 58 Pac. 509; *Speirs v. Union Drop-Forge Co.*, 174 Mass. 175, 54 N. E. 497. If the seal be not affixed to a contract, the authority of the officer executing it must be shown. *Fontana v. Pacific Can. Co.*, 129 Cal. 51, 61 Pac. 580.

a person on its behalf, which it could have authorized him to make.²¹⁰ So, also, a corporation may be liable, like a natural person, on contracts implied, as a matter of fact, from corporate acts,²¹¹ and on quasi contractual obligations, or contracts implied, as a matter of law, because of benefits conferred, or because of duties imposed, by law.²¹²

If the charter of a corporation, or some statute applicable to it, expressly prescribes a certain mode or form for entering into contracts, that mode and form must be followed,²¹³ provided the requirement is mandatory, and not merely directory.²¹⁴ Even where there is such a provision, and it is not complied with, the corporation may be liable. Thus, if it enters into a contract, but not in the form prescribed by its charter or a statute, and receives the consideration, it cannot always escape liability to pay therefor on the ground that the contract was not in the prescribed form, though it might have defeated a recovery so long as the contract remained wholly executory. In *Pixley v. Western Pac. R. Co.*,²¹⁵ the charter of a railroad com-

²¹⁰ *Pixley v. Railroad Co.*, 33 Cal. 183, 91 Am. Dec. 623, 1 Cumming, Cas. Priv. Corp. 121; *Peterson v. City of New York*, 17 N. Y. 450; *Fister v. La Rue*, 15 Barb. (N. Y.) 323. In this case it was said: "It is well settled, at least in this country, that where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement. Having availed itself of the services, and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract."

²¹¹ *Pixley v. Railroad Co.*, 33 Cal. 183, 91 Am. Dec. 623, 1 Cumming, Cas. Priv. Corp. 121; *Goodwin v. Screw Co.*, 34 N. H. 378, 1 Cumming, Cas. Priv. Corp. 119; *Cicotte v. Catholic Church*, 60 Mich. 552, 27 N. W. 682; *Proprietors of Canal Bridge v. Gordon*, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; *City of Selma v. Mullen*, 46 Ala. 411; *Town of New Athens v. Thomas*, 82 Ill. 259; *Lowe v. Ring*, 115 Wis. 575, 92 N. W. 238.

²¹² *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch (U. S.) 299, 3 L. Ed. 351, 1 Cumming, Cas. Priv. Corp. 112; *Danforth v. President, etc.*, 12 Johns. (N. Y.) 227; *Seagraves v. City of Alton*, 13 Ill. 366; *Trustees of Cincinnati Tp. v. Ogden*, 5 Ohio, 23; *Jefferys v. Gurr*, 2 Barn. & Adol. 833.

²¹³ *Head v. Insurance Co.*, 2 Cranch (U. S.) 127, 2 L. Ed. 229; *Blissell v. Spring Valley Tp.*, 110 U. S. 162, 3 Sup. Ct. 555, 28 L. Ed. 105. As that all contracts shall be in writing, and signed by a particular officer or officers. *Topping v. Bickford*, 4 Allen (Mass.) 120, 1 Cumming, Cas. Priv. Corp. 118; *Pixley v. Railroad Co.*, 33 Cal. 183, 91 Am. Dec. 623, 1 Cumming, Cas. Priv. Corp. 121.

²¹⁴ *Southern Life Ins. & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Witte v. Fishing Co.*, 2 Conn. 260; *Bulkley v. Fishing Co.*, 2 Conn. 252, 7 Am. Dec. 271.

²¹⁵ *Pixley v. Railroad Co.*, 33 Cal. 183, 91 Am. Dec. 623, 1 Cumming, Cas. Priv. Corp. 121.

pany declared that no contract should be binding on the company unless in writing. The directors orally employed the plaintiffs to render services for the company, and, after the services were rendered, it was sought to defeat a recovery therefor because the contract was not in writing. The court held, however, that the charter, properly interpreted, only related to executory contracts, and did not exempt the company from liability to pay for the services after having had the benefit of them. "It may be," it was said, "that, while such contract remains executory on both sides, an action could not be maintained by either party to enforce it; but where one of the contracting parties has completely performed it on his part, and thereby rendered to the other the consideration stipulated, the party, having received the consideration promised, cannot be permitted to escape liability on the naked letter of the statute, because the meaning of the law is not such as to afford immunity from liability in such a case."²¹⁶ So, in North Carolina, where the Code provides that contracts by corporations for over \$100 must be in writing, it is held that the provision does not apply to executed contracts.²¹⁷ If, under such a statute, the verbal contract is executed in part only, the corporation cannot be compelled to continue the contract, but is liable for what it has received by the part performance.²¹⁸

In general, where an officer is the proper officer to execute a contract on behalf of the corporation, a person dealing with him is entitled to assume that he is acting regularly, and that all formalities or acts of the corporation or its officers relating to the internal management of its affairs on which the right to execute the contract is conditioned have been performed, and the rights of such person will not be affected because they have not been performed.²¹⁹

²¹⁶ And see *Fister v. La Rue*, 15 Barb. (N. Y.) 323.

²¹⁷ *Curtis v. Mining Co.*, 109 N. C. 401, 13 S. E. 944; *Clowe v. Product Co.*, 114 N. C. 304, 19 S. E. 153.

²¹⁸ *Roberts v. Woodworking Co.*, 111 N. C. 432, 16 S. E. 415.

²¹⁹ *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548; *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397; *Schultze v. Van Doren*, 64 N. J. Eq. 465, 53 Atl. 815; *Connecticut Mut. Life Ins. Co. v. Cleveland*, 41 Barb. (N. Y.) 9; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187; *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. "The doctrine which validates securities within the apparent powers of the corporation, but improperly, and therefore illegally, issued, applies only in favor of bona fide holders for value. A person who takes such a security, with knowledge that the conditions on which alone the security was authorized were not fulfilled is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a bona fide holder of the same security." *Hackensack Water Co. v. DeKay*, *supra*. See, also, *Head v. Providence Ins. Co.* 2 Oranch (U. S.) 127,

Contracts under Seal.

A seal is said by Lord Coke to be wax, with an impression; and no doubt anciently wax was the only substance used, but it is no longer essential. The impression may be made on a wafer attached to the instrument, or any other substance sufficiently tenacious to adhere, and capable of receiving an impression. It is therefore held sufficient if the impression is made on the paper itself on which the instrument is written. It need not be on a separate substance attached to the paper.²²⁰ In some states, statutes have been passed making a scrawl or scroll sufficient, and in some this has been held sufficient independently of any statute; but by the weight of authority, at common law, an impression is essential;²²¹ and in the case of a corporation, of course, it must be by the duly-authorized agent of the corporation. It has been held that a fac simile of the seal of a corporation, printed upon blank forms of obligations, prepared to be executed by the corporation, at the same time when the blanks were printed, and by the same agency, was not a seal at common law.²²²

Where a corporation executes a contract or conveyance required to be under seal, the seal of the corporation must be affixed, and by an officer or agent duly authorized.²²³ It is not necessary that it

2 L. Ed. 229; *Beatty v. Marine Ins. Co.*, 2 Johns. 109, 3 Am. Dec. 401; *Badger v. American Ins. Co.*, 103 Mass. 244, 4 Am. Rep. 547; *Dana v. Bank of St. Paul*, 4 Minn. 385 (Gil. 291); *Leonard v. American Ins. Co.*, 97 Ind. 299.

²²⁰ Clark, Cont. 2d Ed. 52.

²²¹ Id.

²²² *Bates v. Railroad Co.*, 10 Allen (Mass.) 251. A mortgage purporting to be under seal is not invalid because only a scroll, and not the corporate seal, is attached. *Thayer v. Nehalem Mill Co.*, 31 Ore. 437, 51 Pac. 202. And see *Sarmiento v. Davis Boat & O. Co.*, 105 Mich. 300, 63 N. W. 205, 55 Am. St. Rep. 446; *Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433.

²²³ A deed of conveyance by a corporation must be executed in the corporate name and under the corporate seal. A corporation, like an individual, may adopt any seal which is convenient for the occasion. It must, however, be shown to have been so adopted, and it must be affixed as the seal of the corporation, and by an officer or agent duly authorized. *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. 54. And see *Garrett v. Belmont Land Co.*, 94 Tenn. 459, 29 S. W. 726; *Allen v. Brown*, 6 Kan. App. 704, 50 Pac. 505; *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339, 28 S. E. 475. Seals of the agents who execute the instrument will not do. *Regents of University of Michigan v. Detroit Young Men's Soc.*, 12 Mich. 138. Where an act prescribing the forms of acknowledgments provided that, in case the corporation had no seal, the affidavit of the acknowledging officer might state that the corporation had no seal, it was held that the effect of the act was to do away with the necessity of a seal in a deed by a corporation having no seal. *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565, 57 S. W. 1095. See, also, *Turner v. Kingston Lumber & Mfg. Co.*, 106 Tenn. 1, 58 S. W. 854.

shall be affixed by the officer personally. In the case of a contract under seal by a natural person, "if a stranger seal an instrument by the allowance, or commandment precedent, or agreement subsequent, of the person who is to seal it, that is sufficient."²²⁴ The same is true of contracts under seal by corporations. Thus, where the corporate seal was affixed by a printer to the bonds of a corporation, by direction of its officers, and the officers afterwards adopted his act, and signed and issued the bonds, it was held that this was a sufficient sealing by the corporation.²²⁵

In equity, omission of a seal does not always invalidate an instrument executed by a corporation, even in cases where it would be invalid at law. A mortgage by a corporation, for instance, may be a good equitable mortgage, though by the omission of the seal it is not good as a legal mortgage.²²⁶

Where the deed of a corporation, signed by a person authorized to execute the same, recites that it is sealed with the corporate seal, it will be presumed that what purports to be a seal, placed after the person's name, was the seal of the corporation.²²⁷

The mere fact that a deed has the seal of the corporation attached does not make it the deed of the corporation, unless the seal was affixed by some one duly authorized. There is a presumption, however, that it was so affixed, but the presumption is not conclusive, and may always be rebutted.²²⁸ In the absence of express require-

²²⁴ Cruise, Dig. tit. 32, c. 2, § 55.

²²⁵ Royal Bank of Liverpool v. Grand Junction Railroad & Depot Co., 100 Mass. 444, 97 Am. Dec. 115, 1 Cumming, Cas. Priv. Corp. 131.

²²⁶ Allis v. Jones (C. C.) 45 Fed. 148; Precious Blood Soc. v. Elsythe, 102 Tenn. 40, 50 S. W. 759.

²²⁷ Benbow v. Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454; Jacksonville, M. P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379; District of Columbia v. Camden Iron Works, 181 U. S. 453, 21 Sup. Ct. 680, 45 L. Ed. 948; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 23, 36 C. O. A. 633. And see First Nat. Bank v. Mining Co., 89 Fed. 439; Thayer v. Nehalem Mill Co., 31 Ore. 437, 51 Pac. 202.

²²⁸ Koehler v. Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339. It was held in this case that, where neither the president nor the secretary pro tem., who signed a mortgage on behalf of a corporation, nor the regular secretary, who was the regular custodian of the seal, had any knowledge of the way in which the mortgage became sealed, the burden of proof was thrown upon the party seeking to enforce it to show the circumstances under which the seal was affixed, and that it was rightfully and properly done. See, also, Bliss v. Irrigation Co., 65 Cal. 502, 4 Pac. 507; Andres v. Fry, 113 Cal. 124, 45 Pac. 534; Gorder v. Canning Co., 36 Neb. 548, 54 N. W. 830; Yanish v. Fuel Co., 64 Minn. 175, 66 N. W. 198; Leggett v. Banking Co., 1 N. J. Eq. 541, 25 Am. Dec. 728; In re West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282; Reed v. Helols Carbide Specialty Co., 64 N. J. Eq. 231, 53 Atl. 1057; Hall v. Farmers' & M. Bank, 145 Mo. 418, 46 S. W. 1000; Graham v. Partee, 139 Ala. 310, 35 South.

ment to that effect, it is not necessary that the deed of a corporation, executed by an agent under authority of a vote at a stockholders' or directors' meeting, shall recite the vote.²²⁹

Effect of Seal.

It has been said that a sealed instrument conclusively imports a consideration, and therefore the holders of corporate bonds may maintain an action thereon, though they were delivered gratuitously.²³⁰ This dictum, however, cannot be supported. The seal on a contract of a corporation has no greater effect than a seal on a natural person's contract. The seal does not import a consideration at all at common law. It merely renders a consideration unnecessary.²³¹ Where there was in fact a consideration, the seal does not prevent a natural person from defeating an action on his contract by showing that the consideration was illegal or immoral.²³² So, in the case of corporate contracts under seal, want of consideration may be shown, or the consideration may be shown to have been such that the corporation had no authority to enter into the contract. "Although the agreement be under seal," said Lord Campbell on this point, "we may examine to see whether there was any, and what, consideration for the contract to pay money, when we are to determine whether the contract was or was not ultra vires."²³³

As we have pointed out, corporate bonds may be negotiable instruments, in which case inquiry into the consideration would not be permitted, in order to defeat liability to a bona fide holder.²³⁴

1016, 101 Am. St. Rep. 32; *Quackenboss v. Globe & R. Fire Ins. Co.* 177 N. Y. 71, 69 N. E. 223. Contra, *Morrison v. Wilder Gas Co.*, 91 Me. 492, 40 Atl. 542, 64 Am. St. Rep. 257.

²²⁹ *McDaniels v. Manufacturing Co.*, 22 Vt. 274.

²³⁰ *Foster, J., in Royal Bank of Liverpool v. Grand Junction Railroad & Depot Co.*, 100 Mass. 444, 445, 97 Am. Dec. 115, 1 Cumming, Cas. Priv. Corp. 131.

²³¹ *Anson*, Cont. 49; *Clark*, Cont. (2d Ed.) 57.

²³² *Clark*, Cont. (2d Ed.) 57.

²³³ *Mayor, etc., of City of Norwich v. Norfolk Ry. Co.*, 4 El. & Bl. 448.

²³⁴ Ante, p. 136.

CHAPTER VI.

excess contracts

POWERS AND LIABILITIES OF CORPORATIONS (Continued).

- 62. What Acts are Ultra Vires—A Corporation Can Exceed Its Powers.
- 63. Effect of Ultra Vires Act—In General.
- 65, 66. Ultra Vires Conveyances of Land or Transfers of Personality.
- 67. Ultra Vires Contracts.
- 68. Illegal Contracts.

WHAT ACTS ARE ULTRA VIRES—A CORPORATION CAN EXCEED ITS POWERS.

62. An act is said to be ultra vires when it is beyond the corporate powers. By the term "power," as applied to corporations, is meant authority or right to act. It is possible for a corporation to exceed its powers and do unauthorized acts, and out of such acts rights and liabilities may arise.

What Acts are Ultra Vires.

An act which is beyond the powers conferred upon the corporation by its charter is said to be ultra vires. The term "ultra vires," however, is frequently used in other senses. Thus it is sometimes used "to express that the act of the directors or officers is in excess of their authority as agents of the corporation,¹ or that the act of the majority of the stockholders is in violation of the rights of the minority,² or that the act has not been done in conformity with requirements of the charter."³ * * * In its legitimate use, the expression should be applied only to such acts as are beyond the powers of the corporation itself.⁴ The term is also sometimes used to express that the act is illegal on other grounds than because the act is beyond the corporate powers.⁵ The use of the expression should be confined, however, to acts which are beyond the powers conferred upon the corporation by its charter.⁶

A Corporation Can Exceed its Powers.

When it is said that a corporation has such "powers" only as are expressly or impliedly conferred upon it by the legislature which cre-

¹ Post, pp. 430-440.² Post, pp. 430-440.³ Ante, p. 156⁴ Camden & A. R. Co. v. May's Landing & E. H. C. R. Co., 48 N. J. Law, 530, 7 Atl. 523, per Depue, J. See, also, Building & L. Assn. v. Home Sav. Bk. 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245.⁵ Post, p. 187.⁶ Camden & A. R. Co. v. May's Landing & E. H. C. R. Co., supra, per Depue, J.

ated it, is not meant that it is ~~unable to do any act in excess of the powers conferred, but simply that it has no authority or right to do such an act.~~ It can, in fact, exceed its powers, and rights and liabilities may arise out of its unauthorized or "ultra vires" acts. In this respect it is like a natural person. Like a natural person, it can do wrong.⁷ If it were otherwise, it could not become liable for a tort, nor could it be prosecuted for a misdemeanor, such as the maintenance of a nuisance; and it is perfectly well settled, as we shall see, that it may be civilly liable for a tort,⁸ and criminally responsible for misdemeanor.⁹ Nor could it ever become liable to forfeiture of its charter for a violation thereof.¹⁰ So, as we shall see, a corporation may, under some circumstances, incur liability by reason of a contract entered into in excess of its powers.¹¹ "Corporations, like natural persons, have power and capacity to do wrong. They may, in their dealings and contracts, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes or faculties which render it possible for them thus to act."¹²

This point was discussed in *Bissell v. Michigan Southern & N. I. R. Cos.*¹³ It was contended in that case that if the proper officers of a corporation enter into a contract or transaction which is not within the authority of the corporation, the transaction cannot be considered as in any sense that of the corporation, but is, in legal contemplation, that of the officers personally; in other words, that a corporation cannot exceed its powers, and that for this reason it cannot, under any conceivable circumstances, be held liable on an ultra vires contract or transaction, the officers alone being liable. Comstock, C. J., in repudiating this reasoning, said: "In this view these artificial existences are cast in so perfect a mold that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized

⁷ See *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176, 2 Cumming, Cas. Priv. Corp. 107.

⁸ Post, p. 193.

⁹ Post, p. 198.

¹⁰ Post, p. 235.

¹¹ Post, p. 167; *Bissell v. Railroad Cos.*, 22 N. Y. 259, 1 Cumming, Cas. Priv. Corp. 187; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 31.

¹² *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412.

¹³ 22 N. Y. 259, 1 Cumming, Cas. Priv. Corp. 187.

acts is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons." In another case, where a similar contention was made, it was said by Sutherland, J., in refuting the doctrine: "This would be a most convenient distinction for corporations to establish,—that every violation of their charter, or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." ¹⁴

EFFECT OF ULTRA VIRES ACT.

63. If a corporation performs or threatens to perform an act which is ultra vires, but not otherwise unlawful—

- (a) The state may, when the act is done, maintain proceedings against it to forfeit its charter for misuser.**
- (b) A stockholder or member may, where the act is threatened, maintain a bill in equity to enjoin the corporation from performing it. He may sue to enjoin performance of an ultra vires contract which the corporation has already entered into, provided it is not binding on the corporation under the rules hereafter shown.**
- (c) As to the effect of an ultra vires conveyance to or by a corporation, and as to the circumstances under which an action may be maintained on an ultra vires contract, the authorities, as will be seen, are conflicting.**

There is much conflict in the cases as to the effect of a corporation's ultra vires acts and contracts, and as to the circumstances under which they may give rise to actions. It is not possible to state general rules that will apply in all the states. There are some rules which are universally recognized, while as to others there is a direct conflict. On some points there are decisions by the same court which cannot well be reconciled. All that can be done in a work of this character is to group the decisions as far as possible, and show the different positions the courts have taken.

All the authorities agree that where a corporation enters into an ultra vires contract, or performs an ultra vires act, though the contract or act is only unlawful because it is unauthorized, the state may,

¹⁴ *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 81.

if the act is sufficiently flagrant to justify it, maintain proceedings directly against the corporation to enforce a forfeiture of its charter for the misuser of power. This question will be fully considered hereafter.¹⁵

The authorities also agree that, under certain conditions, a bill in equity may be maintained by a stockholder or member against the corporation to enjoin it from entering into an ultra vires contract, or from performing a threatened ultra vires act; and such a bill may also be maintained to prevent it from performing an ultra vires contract,¹⁶ unless the contract is enforceable against it, under the doctrines which we shall presently explain, notwithstanding its ultra vires character. The fact that a stockholder is not injured by an ultra vires contract of the corporation, to which all the other stockholders have consented, does not prevent him from maintaining a suit to enjoin its performance.¹⁷

As to the effect of an ultra vires conveyance to or by a corporation, as between the parties, and as to whether an action may be maintained by or against a corporation under an ultra vires contract, the authorities are conflicting, as we shall see in the following sections.

SAME—ULTRA VIRES CONVEYANCES OF LAND, OR TRANSFERS OF PERSONALTY.

65. An ultra vires conveyance of land to or by a corporation, which has the power to take and convey, but which in the particular instance has done so for an unauthorized purpose, is not void, but vests the title in the grantee. But, if a corporation is prohibited from acquiring land, some courts hold that a conveyance to it is void. The same rule applies to transfers of personal property.

66. When the title to property which it has no authority to hold has not vested in the corporation, the courts will not aid it to acquire the title.

Where a corporation, having the power to acquire and hold land for certain purposes only, takes a conveyance of land for a purpose not authorized, or takes more land than it is authorized to hold, the conveyance is not absolutely void. The state may proceed directly against it for exceeding the powers conferred upon it, but the question is solely between it and the state.¹⁸ Neither the grantor nor any other

¹⁵ Post, p. 235.

¹⁶ Post, p. 375.

¹⁷ *Byrne v. Manufacturing Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304.

¹⁸ It seems that, in the absence of statute, the land is not subject to forfeiture to the state, but that its remedy in a proper case is to proceed against the corporation to forfeit its charter. See 8 Harv. L. R. 15; Commonwealth

private individual can attack the conveyance in a suit by or against the corporation to recover the land. So long as the state remains inactive, no one can complain; for, as was said in a California case, it would lead to infinite embarrassments if in suits by corporations to recover possession of their property inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity.¹⁹ If a corporation is absolutely prohibited from acquiring or holding land, and not merely restricted in the purposes for which it may do so, or as to the amount, it has been held that a conveyance to it is absolutely void, and the objection, therefore, may be raised, not only by the state in a proceeding against the corporation, but also by the grantor, or any other private individual, collaterally, as in a suit by or against the

v. New York, L. E. & W. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634; *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016.

¹⁹ *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 544. And see *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313, 1 Cumming, Cas. Priv. Corp. 85; *Ayers v. Banking Co.*, L. R. 3 P. C. 548, 2 Cumming, Cas. Priv. Corp. 20; *Hough v. Land Co.*, 73 Ill. 23, 24 Am. Rep. 230, 1 Cumming, Cas. Priv. Corp. 90; *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477; *Banks v. Poltiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *Bone v. Canal Co.* (Pa. Sup.) 5 Atl. 751; *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016; *Barrow v. Turnpike Co.*, 9 Humph. (Tenn.) 304; *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 595; *Gilbert v. Hole*, 2 S. D. 164, 49 N. W. 1; *American Mortg. Co. of Scotland v. Tennille*, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529; *Long v. Railway Co.*, 91 Ala. 519, 8 South. 706; *Cooney v. Booth Packing Co.*, 169 Ill. 370, 48 N. E. 406; *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088; *Central Ohio Natural G. & F. Co. v. Capital City Dairy Co.*, 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395; *Miller v. Flemingsburg & F. S. Turnpike Co.*, 109 Ky. 475, 59 S. W. 512; *Hagerstown Mfg., M. & I. Co. v. Keedy*, 91 Md. 430, 46 Atl. 965; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 33 C. C. A. 517. It has been held, however, that where property is given by will to a corporation, which has no capacity to take or hold it, or whose capacity to take or hold is limited by its charter or by the general statute law, the bequest or devise will be invalid in so far as it exceeds the limit, and that the objection may be raised by any person interested under the will. *Starkweather v. Bible Soc.*, 72 Ill. 50, 22 Am. Rep. 133; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Cromle's Heirs v. Society*, 3 Bush (Ky.) 365; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *In re McGraw's Estate*, 45 Hun, 354, affirmed 111 N. Y. 66, 19 N. E. 233, 2 Cumming, Cas. Priv. Corp. 22; *Trustees v. Executors*, 3 Jones, Eq. (N. C.) 253; *House of Mercy v. Davidson*, 90 Tex. 529, 39 S. W. 924. But see, contra, where the devise is merely of more land than the corporation is permitted to hold, *Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 Atl. 1052, 82 L. R. A. 293; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *Hamsher v. Hamsher*, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; *Congregational Church Bldg. Soc. v. Everett*, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308; *Farrington v. Putnam*, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339.

corporation to recover the land;²⁰ but this doctrine is not beyond question.²¹

In *Case v. Kelly*²² a clear distinction was made by the supreme court of the United States between cases in which the title to land, which a corporation has no power to hold, has vested in it, and cases in which the title has not vested in it, and the corporation seeks the aid of the court to acquire title; and it was held that in the latter case the court should not aid the corporation. In the case at bar, land had been donated to a railroad company for purposes not authorized by its charter, and conveyed to officers of the company. A receiver of the company brought suit to charge them as trustees for the company, and to recover the land. It was held that the suit could not be maintained. "We need not stop here," said the court, "to inquire whether this company can hold title to lands which it is impliedly forbidden by its charter to do, because the case before us is not one in which the title to the lands in question has ever been vested in the company, or attempted to be so vested. The company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law, and obtain a title which it has no power to hold. We think the questions are very different ones, and that, while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law, and enabling the company to do that which the law forbids."

The rules above stated apply also to ultra vires transfers of personal property and assignments of choses in action to or by a corporation. If a corporation purchases or sells personal property, and possession is delivered, third persons cannot dispute the title under the transfer, and contend that the property remains in the seller, on the

²⁰ See *Hayward v. Davidson*, 41 Ind. 212; *Carroll v. City of East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *State v. Hudson Land Co.*, 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430.

²¹ *Carlow v. C. Aultman & Co.*, 23 Neb. 672, 44 N. W. 873; *Fisk v. Patton*, 7 Utah, 399, 27 Pac. 1; post, p. 623.

²² 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, 1 Cumming, Cas. Priv. Corp. 106. See, also, *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 119 Ala. 105, 24 South. 114. One who has entered into a contract to sell land to a corporation, which has made improvements thereon, cannot refuse to perform on the ground that it had not authority to purchase. *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 92 N. W. 123.

ground that the corporation had no power to take and hold or to transfer the same. Nor can the purchaser of property from a corporation defend an action on a note given to the corporation for the price, on the ground that the corporation had no power to hold the property.²³ The same is true where a corporation purchases a note, in excess of its powers. The note is valid, and the maker, when sued thereon by the corporation, cannot defeat the action by alleging that the purchase was ultra vires.²⁴

SAME—ULTRA VIRES CONTRACTS.

67. On the question whether, and under what circumstances, an action will lie on an ultra vires contract, the authorities are in direct conflict, and there is much confusion in the cases. The different positions which have been taken by the courts may be stated thus:

- (a) Some of the courts hold that a contract by a corporation which is objectionable only because it is ultra vires or unauthorized is on that ground alone unlawful and void, as being beyond the powers conferred upon it, and that, as a rule, no action can be maintained upon it. But**
 - (1) If the contract has been fully executed on both sides, the courts will not interfere at the instance of either party to undo what has been done.**
 - (2) If the contract is executory on both sides, neither party can maintain an action upon it.**
 - (3) Where the contract is not clearly ultra vires, but is so only because of facts or circumstances of which the other party has neither actual nor constructive notice, an action on the contract may be maintained by the other party against the corporation.**
 - (4) A negotiable instrument executed or indorsed by a corporation is good as against it in the hands of a holder for value and without notice, unless the corporation clearly had no power at all to execute or indorse such instruments.**
 - (5) A transaction, or contract, if severable, may be valid in part, though in part it is ultra vires.**
 - (6) Where either party has received benefits under the contract in the form of money, property, or services, an action quasi ex contractu or suit for an accounting may be maintained to recover therefor.**

²³ See *Ryers v. South Australian Banking Co.*, L. R. 3 P. C. 548, 2 Cumming, Cas. Priv. Corp. 20; *Edwards v. Fairbanks*, 27 La. Ann. 449; 2 Mor. Corp. § 712; *Holmes & Griggs Manuf'g Co. v. Holmes & Wessell Metal Co.*, 53 Hun, 52, 5 N. Y. Supp. 937; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 37 L. R. A. 138, 65 Am. St. Rep. 22.

²⁴ *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5; *Baker v. Northwestern Guaranty Loan Co.*, 36 Minn. 183, 30 N. W. 464; *St Paul Gaslight Co. v. Village of Sandstone*, 73 Minn. 226, 75 N. W. 1050.

- (7) If a corporation borrows money without authority, but applies it to the payment of valid debts, so that its liabilities are not increased, the lender, or holders of obligations or securities issued for the loan, will be subrogated in equity to the rights of the creditors of the corporation whose debts have been so paid.
- (b) Most courts hold that the contracts of a corporation which are objectionable only because they are ultra vires, are not so far illegal that no action can be maintained upon them, and that the plea of ultra vires should not prevail, whether interposed for or against the corporation, when it would be inequitable and unjust to allow it; as where the party seeking to enforce the contract has performed it on his part.
- (c) An ultra vires contract cannot be made binding upon the corporation by the assent or ratification of all the shareholders; but some courts hold otherwise, where the rights of the corporate creditors are not concerned.

The Doctrine that an Ultra Vires Contract is Void.

According to the doctrine of general capacities, which prevails in the English courts, a corporation has the same power to contract as a natural person, except so far as it may be restricted by its charter, subject to the qualification, however, that when a corporation is created for a particular purpose the act creating it impliedly prohibits it from exercising any power which the act does not expressly or impliedly authorize.²⁵ And under this doctrine the courts have refused to enforce prohibited contracts. According to the doctrine of special capacities, which is commonly asserted by the American courts, a corporation has such powers, and such powers only, as are expressly or impliedly conferred by its charter.²⁶ If this doctrine were logically applied, it would follow that a contract which is beyond the powers conferred upon a corporation—that is, which is ultra vires—is void and of no legal effect. Perhaps no court has applied this doctrine with perfect consistency, but it prevails in the main in the supreme court of the United States and in some of the other jurisdictions.²⁷

“A contract of a corporation which is ultra vires in the proper sense,” said Mr. Justice Gray in a leading case,²⁸ “that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have

²⁵ East Anglian Rys. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1 Cumming, Cas. Priv. Corp. 142; Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 1 Cumming, Cas. Priv. Corp. 152.

²⁶ Ante, p. 121.

²⁷ Infra, notes 28-34.

²⁸ Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

"The reasons," said Mr. Justice Gray, in another case,²⁹ "why a corporation is not liable upon a contract ultra vires,—that is to say, beyond the powers conferred upon it by the legislature, and varying from the objects of its creation, as declared in the law of its organization,—are: (1) The interests of the public that the corporation shall not transcend the powers granted; (2) the interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; (3) the obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers."

In many jurisdictions, as we shall see, the strict rule of ultra vires is so far relaxed that an action may be maintained on an ultra vires contract, if one party has performed and it would be unjust to allow the plea.³⁰ But, where the doctrine is applied strictly, the fact that the other party has incurred expenses or sustained losses, or even fully performed on his part, on the faith of the corporation's ultra vires promise, cannot render the corporation liable on the contract itself.³¹

²⁹ *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157. See, also, *Union Pac. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; *McCormick v. Bank*, 105 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; *De La Vergne R. M. Co. v. German Sav. Inst.*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65; *Anglo-American Land, M. & A. Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89.

³⁰ *Post*, p. 178.

³¹ *Davis v. Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221, 1 Cumming, Cas. Priv. Corp. 173; *Pearce v. Railroad Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184, 1 Cumming, Cas. Priv. Corp. 146; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, 1 Cumming, Cas. Priv. Corp. 164, W. D. Smith, Cas. Corp. 132, Shep. Cas. Corp. 70; *Downing v. Road Co.*, 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148, W. D. Smith, Cas. Corp. 129, Shep. Cas. Corp. 75; *Northwest-*

And, conversely, performance by the corporation will not render the other party liable.³² We are speaking here only of cases in which the action is brought directly on the contract. Actions quasi ex contractu in disaffirmance of the contract may be maintained.³³ Not only is the defense of ultra vires available to the corporation in an action by the other party on the contract, but it is also available to the other party in an action by the corporation. The contract, being wholly null and void, cannot be made the foundation of an action by either party,³⁴ unless the case falls within one of the exceptions hereinafter mentioned.³⁵

ern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781, 1 Cumming, Cas. Priv. Corp. 245; Straus v. Insurance Co., 5 Ohio St. 59; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. '24, 11 Sup. Ct. 478, 35 L. Ed. 55; Miller v. Insurance Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; Bacon v. Insurance Co., 31 Miss. 116; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Albert v. Bank, 1 Md. Ch. Dec. 407; Abbott v. Packet Co., Id. 542; National Home B. & L. Ass'n v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; Best Brewing Co. v. Klasson, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 Atl. 101. Thus, where two railroad companies, in excess of their powers, consolidated, and as a consolidated company purchased property in excess of their powers, and gave notes therefor, it was held that an indorsee of the notes, who had notice of the circumstances under which they were given, could not maintain an action against the corporations thereon. Pearce v. Railroad Co., supra. So where a corporation purchased and received property which it was not authorized to purchase or receive, it was held that an action would not lie against it for the price. Downing v. Road Co., supra. And where a railroad company and a manufacturing company joined in an ultra vires subscription to contribute to defray the expenses of a festival, and the festival was held, and the expenses paid by the committee, it was held that the committee could not maintain an action on the subscription. Davis v. Railroad Co., supra. A national bank, which purchased and held stock in another national bank, being without power so to do, although it has received dividends on the stock, may plead that the transaction was ultra vires in a suit by the receiver of the second bank after its insolvency to enforce the stockholders' liability under an assessment made by the comptroller of the currency. First Nat. Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007. And see First Nat. Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537. See cases cited notes 41, 44, infra.

³² Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Brunswick Gas L. Co. v. United Gas, etc., Co., 85 Me. 541, 27 Atl. 525, 35 Am. St. Rep. 385; Buckeye M. & F. Co. v. Harvey, 92 Tenn. 116, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71.

³³ Post, p. 176.

³⁴ Downing v. Road Co., 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148, W. D. Smith, Cas. Corp. 129, Shep. Cas. Corp. 75; Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

³⁵ Post, pp. 171-178.

Same—Executed and Executory Contracts.

If an ultra vires contract has been fully executed on both sides, the rule prevails everywhere that neither party can maintain an action at law or a suit in equity to recover what he or it has parted with. Thus one who has sold, received payment for, and conveyed land to a corporation cannot sue to rescind the conveyance on the ground that the corporation had no power to purchase. Nor under the same circumstances could the corporation rescind and recover back what it had paid.³⁶ "When the contract is fully executed, where whatever was contracted to be done on either hand has been done, * * * the law will not interfere, at the instance of either party, to undo what was originally unlawful, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other."³⁷

So long as an ultra vires contract is wholly executory on both sides, however, all courts agree that no action can be maintained upon it.³⁸ And even if the contract has been partly performed on one or both sides, as a rule, no action can be maintained to enforce it, either to recover damages for its breach or for specific performance,³⁹ although the rule is subject to exception in some jurisdictions.⁴⁰ Thus no action can be maintained upon an ultra vires lease, notwithstanding that

³⁶ Long v. Railway Co., 91 Ala. 519, 8 South. 706, 24 Am. St. Rep. 931; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; Savings & Trust Co. v. Bear Valley Ir. Co. (C. C.) 112 Fed. 693; Graton & Knight Mfg. Co. v. Redelshelmer, 28 Wash. 370, 68 Pac. 879. When a corporation subscribes for stock in another corporation, and the contract is fully executed, the defense of ultra vires cannot be maintained in an action to recover dividends. Blgbee & W. R. Packet Co. v. Moore, 121 Ala. 379, 25 So. 602. Although a contract of partnership entered into by a corporation with natural persons may be ultra vires, and not enforceable while executory, nevertheless, after it has been executed, and the corporation has embarked its funds in, and supplied goods to, the firm, such funds and goods cannot be exempted from liability for the partnership debts, or withdrawn by the corporation after insolvency of the partnership, and to the prejudice of its creditors. Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129. Where an insurance company received bank stock, certificates of deposit, and cash in payment of a deposit in an insolvent bank, it was not entitled to repudiate the transaction, after it was executed, on the ground that the acquisition of the stock was ultra vires. Fidelity Ins. Co. v. German Sav. Bank, 127 Iowa, 591, 103 N. W. 958.

³⁷ Long v. Railway Co., supra.

³⁸ Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482; Bosshardt & Wilson o. v. Crescent Oil Co., 171 Pa. 109, 32 Atl. 1120; McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; Nebraska Shirt Co. v. Horton (Unof.) 3 Neb. 888, 98 N. W. 225.

³⁹ Post, pp. 182, 188.

⁴⁰ Infra, p. 172.

the lease has been partly performed, and the remedy, if any, must be sought in action quasi ex contractu,⁴¹ except in jurisdictions where the strict rule of ultra vires is relaxed.⁴²

In a leading case in the supreme court of the United States,⁴³ where a railroad company had leased its railroad for a term of years, reserving an option to terminate the lease at any time, and covenanted to submit to arbitration the ascertainment of the loss or damage to the lessee by reason of such termination, and to abide by the award, it was held that no action could be maintained by the lessee on the covenant. "What is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action; damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its nonperformance. As to this it is not an executed contract." And in subsequent cases in the same court it has been uniformly held that no action can be maintained on an ultra vires lease to recover rent accrued during the occupation by the lessee, although the lessee remained in undisturbed possession of the premises.⁴⁴ Yet the federal courts are not consistent in their application of the doctrine that an ultra vires contract is void; for, while they have declared that an ultra vires lease is void and that it is the duty of the corporation to rescind it,⁴⁵ they have enjoined the lessor from re-entering before expiration of the lease,⁴⁶ and have refused to assist the lessor to recover possession.⁴⁷

⁴¹ *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Id.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; *Brunswick Gaslight Co. v. United Gas Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385.

⁴² *Camden & A. R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. Law, 530, 7 Atl. 523; *City of Corpus Christi v. Central Wharf & W. Co.*, 8 Tex. Civ. App. 94, 27 S. W. 803; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; *infra*, p. 178.

⁴³ *Thomas v. Railroad Co.*, *supra*.

⁴⁴ See *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; and cases cited note 41, *supra*.

⁴⁵ *Thomas v. Railroad Co.*, *supra*.

⁴⁶ *American Union Telegraph Co. v. Union Pacific R. Co.*, 1 Fed. 745, 1 McCrary, 188.

⁴⁷ *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12

Same—Ignorance of Ultra Vires Character of Transaction.

Every person dealing with a corporation is charged with notice of the limitations of its powers.⁴⁸ "Every corporation necessarily carries its charter wherever it goes; for that is the law of its existence.

* * * Every person who deals with it anywhere is bound to take notice of the provisions which have been made in its charter."⁴⁹ Thus it has been held that if a corporation, not being authorized by its charter, enters into a contract of guaranty or suretyship, this is clearly in excess of its powers, and that the other party is chargeable with knowledge of this fact, and cannot hold it liable.⁵⁰

Even in those jurisdictions where the courts hold ultra vires contracts unlawful and void, however, they make an exception to the rule where the party dealing with the corporation did not know, and is not chargeable with knowledge of, the ultra vires nature of the contract into which he entered. The cases are virtually agreed that, if the officers of a corporation make a contract with a man in regard to matters apparently within the powers of the corporation, but which, upon proof of extrinsic facts, of which he had no notice, and of which he is not chargeable with notice, is shown to have been ultra vires, the corporation may be held liable, unless it may and does avoid liability by taking timely steps to prevent loss or damage to the other party.⁵¹ Thus, if a corporation empowered to build and operate a

Sup. Ct. 953, 36 L. Ed. 748. This was upon the ground that the lease was illegal, and the parties were in *pari delicto*; but this is inconsistent with a recovery under an ultra vires contract *quasi ex contractu*, which is allowed by the same court. See *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 497, 35 L. Ed. 107; *Central Transp. Co. v. Pullman Palace Car Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108.

⁴⁸ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Lucas v. Transfer Co.*, 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 449; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; *Spencer v. Mobile, etc., R. Co.*, 79 Ala. 576; *Memphis Grain & E. Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798; *Kraniger v. People's B. Soc.*, 60 Minn. 94, 61 N. W. 904; *Senour Mfg. Co. v. Church Paint & Mfg. Co.*, 81 Minn. 294, 84 N. W. 109.

⁴⁹ *Relfe v. Runelle*, 103 U. S. 222, 26 L. Ed. 337.

⁵⁰ *Lucas v. Transfer Co.*, *supra*.

⁵¹ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Lucas v. Transfer Co.*, 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 449; *Bissell v. Railroad Co.*, 22 N. Y. 259, 1 Cumming, Cas. Priv. Corp. 196, per Comstock, C. J.; *Boyce v. Coal Co.*, 87 W. Va. 73, 16 S. E. 501; *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843, 38 C. C. A. 433. "When the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of ultra vires does not apply." *Monument Nat.*

certain line of railroad should purchase rails for the purpose of building another line, or for the purpose of speculating in them, without the knowledge of the vendor, the corporation could be held on the contract.⁵² So, if a corporation, which is limited by its charter as to the amount of indebtedness it may incur, should purchase property, and in doing so exceed that amount, the seller, being ignorant of the amount of the company's indebtedness at the time of the purchase, could hold it on the contract.⁵³

It is held, however, that where a corporation is created, and its powers conferred by a public act, a man who enters into a contract with it, which is clearly in excess of its powers as shown by the act, cannot enforce the contract, for he is chargeable with knowledge of public laws, and therefore of the powers of the corporation.⁵⁴

Same—Negotiable Bills and Notes—Bonds.

A negotiable bill or note accepted, made, or indorsed by a corporation, in excess of the powers conferred upon it by its charter, stands, of course, upon exactly the same footing as other contracts, as between the original parties. Different questions arise in cases where the instrument has passed into the hands of one who claims to be a bona fide holder for value. If the execution or indorsement of a negotiable instrument by a corporation is obviously foreign to the purposes of its charter, such an instrument is void into whosoever's hands it may come, for every person is chargeable with notice of its ultra vires character; but if a corporation is of such a character that it may have occasion to execute or to take and indorse such instruments in the conduct of its business, and it accepts a bill or executes a note, or indorses a bill or note, for a purpose that is foreign to its objects, as where it gives its paper as an accommodation, or in payment for property which it has no authority to purchase, the instrument will be binding in the hands of a purchaser for value and with-

Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322. Where a corporation, having power to borrow money for the purposes of its business, borrowed for another purpose, in the absence of knowledge by the lender of the improper purpose, the misapplication of the money did not invalidate the loan. In re *David Payne & Co., Limited* [1904] 2 Ch. 608. Where a corporation was authorized to lend on bond and mortgage for one year, but lent on note and mortgage for two years, it could maintain an action thereon. *Germantown Farmers' Mut. Ins. Co. v. Dhein*, 43 Wis. 420, 28 Am. Rep. 549.

⁵² Dictum in *Lucas v. Transfer Co.*, supra. See, also, *Brewer & H. Brewing Co. v. Boddie*, 181 Ill. 622, 55 N. E. 49.

⁵³ *Humphrey v. Association*, 50 Iowa, 607; *Auerbach v. Mill Co.*, 29 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285.

⁵⁴ *Lucas v. Transfer Co.*, 70 Iowa, 542, 30 N. W. 771, 59 Am. Rep. 449.

out notice.⁵⁵ If the purchaser had notice in fact, or if the circumstances were such as to put him on inquiry, and charge him with notice, of the ultra vires character of the transaction, he cannot recover, unless under rules hereafter shown the original holder could recover.⁵⁶

As we have seen, the bonds issued by a corporation, and the coupons attached thereto, will be regarded as negotiable instruments, and as subject to the rules of law relating to such instruments, if it appears from the form in which they were issued, and the mode of giving them circulation, that they were intended to have this character. And they will be subject to the rules protecting bona fide purchasers of negotiable instruments.⁵⁷

Same—Severable Transaction.

A contract or transaction by a corporation, if severable, may be valid in so far as it is within the powers of the corporation, though in part it is ultra vires.⁵⁸ Thus, if a railroad company, having implied authority to issue bonds in order to raise money for its business, but without authority to execute a mortgage on its property, issues bonds secured by a mortgage, the invalidity of the mortgage cannot be set up to defeat a recovery on the bonds.⁵⁹ So where a

⁵⁵ Norton, Bills & N. (3d Ed.) 222-226; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322, 1 Cumming, Cas. Priv. Corp. 315; National Park Bank v. German-American M. W. & S. Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673, 1 Cumming, Cas. Priv. Corp. 318, Shep. Cas. Corp. 132; National Bank v. Young, 41 N. J. Eq. 531, 7 Atl. 488; Ex parte Estabrook, Fed. Cas. No. 4,534; Ridgway v. Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; Southern Loan Co. v. Morris, 2 Pa. 175, 44 Am. Dec. 188; McIntire v. Preston, 5 Gilman (Ill.) 48, 48 Am. Dec. 321; Auerbach v. Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285; Jacobs Pharmacy Co. v. Southern Banking & Trust Co., 97 Ga. 573, 25 S. E. 171; Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344.

⁵⁶ National Park Bank v. German-American M. W. & S. Co., supra. In this case a corporation without authority indorsed promissory notes for the accommodation of the maker, who himself had them discounted. It was held that the fact that the maker had them discounted for his own benefit, being unexplained, was notice to the discounter that the indorsement was not in the usual course of business, but merely for the accommodation of the maker, and that the discounter, therefore, could not hold the corporation liable. And see Price v. Coal Co., 32 S. W. 267, 17 Ky. Law Rep. 865.

⁵⁷ Ante, p. 136, and cases there cited.

⁵⁸ When a divisible part of a contract is ultra vires, but is not malum in se or malum prohibitum, the remainder may be enforced, unless it appears from a consideration of the whole agreement that it would not have been made independently of the part which is void. Illinois Trust & S. Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

⁵⁹ Philadelphia & S. R. Co. v. Lewis, 33 Pa. 33, 75 Am. Dec. 574. And

railroad or other corporation has express authority to mortgage its property, a mortgage executed by it, covering both its property and its franchise, will not be avoided as to the property by the fact that there was no authority to mortgage the franchise.⁶⁰

Same—Actions Quasi ex Contractu—Suit in Equity for Accounting.

If a corporation has received money or property or the benefit of services under an ultra vires contract, the courts are virtually agreed that it may be compelled to refund the value of that which it has actually received in an action quasi ex contractu, or, in a proper case, in a suit for an accounting.⁶¹ Thus, where a manufacturing company purchased materials for the purpose of selling them again on speculation, it was held that the seller, after delivering part and repudiating the contract, could recover the value of the materials delivered. "It

see *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; *Illinois Trust & S. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

⁶⁰ *Gloninger v. Railroad Co.*, 139 Pa. 13, 21 Atl. 211.

⁶¹ *Day v. Buggy Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352, 1 Cumming, Cas. Priv. Corp. 261; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781, 1 Cumming, Cas. Priv. Corp. 245; *Davis v. Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221, 1 Cumming, Cas. Priv. Corp. 173; *Morville v. Tract Soc.*, 123 Mass. 129, 25 Am. Rep. 40; *White v. Bank*, 22 Pick. (Mass.) 181, 1 Cumming, Cas. Priv. Corp. 239; *New Castle Northern R. Co. v. Simpson (C. C.)* 23 Fed. 214; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454; *Anthony v. Machine Co.*, 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575; *Moore v. Tanning Co.*, 60 Vt. 459, 15 Atl. 114; *Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; *Slater Woolen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823; *Brunswick Gas L. Co. v. United Gas, etc., Co.*, 85 Me. 541, 27 Atl. 525, 35 Am. St. Rep. 385; *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713; *Emmerling v. First Nat. Bank*, 97 Fed. 739, 38 C. C. A. 399; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Pullman Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108. "A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." *Central Transp. Co. v. Pullman Palace Car Co.*, *supra*.

is to be observed," said the court, "that the contract, though void in law, involved no element of criminality, and nothing of an immoral nature. The case is not, therefore, one in which the law will leave the parties without redress for the consequences of criminal or immoral action. The plaintiff has a right to sell her manufacture, and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment, notwithstanding it exceeded its powers in the purchase."⁶² And if money is paid by a corporation under a contract which is merely ultra vires, and not otherwise unlawful, it may recover the money in an action for money had and received. Thus, where a transportation company entered into an ultra vires contract to purchase wheat, and paid part of the price, it was held that on failure of the other party to deliver the wheat the money could be recovered back by the corporation.⁶³

Same—Relief in Equity against Ultra Vires Contract.

Where a corporation has received the consideration for an ultra vires contract, and then comes into a court of equity asking to have the contract declared void, and to be restored to the rights which it parted with, the relief will not be granted unless the corporation restores the consideration which it has received. In *American Union Tel. Co. v. Union Pac. Ry. Co.*,⁶⁴ a railroad company, authorized also to construct and operate a telegraph line, leased the telegraph line to another without authority, and received the consideration. It afterwards brought suit in equity to set the lease aside, and recover possession of the property. Judge McCrary held that the relief would not be granted unless it returned the consideration which it had received.

Same—Borrowing Money—Subrogation of Lender.

In equity, if a corporation borrows money without authority, but applies it in whole or in part, directly or indirectly, to the payment of valid debts, the lender will not lose the money thus applied, but will be subrogated to the rights of the creditors of the corporation thus paid, and to that extent may enforce his claim against the corporation. And if for such loan the corporation, without authority, issues debentures or bonds, the holders of them will occupy the same position as the lender.⁶⁵ This doctrine depends on the fact that liabili-

⁶² *Day v. Buggy Co.*, supra. See, also, *Richmond Guano Co. v. Farmers' Cotton Seed Mill & G. Co.*, 126 Fed. 712, 61 C. C. A. 630.

⁶³ *Northwestern Union Packet Co. v. Shaw*, supra.

⁶⁴ 1 McCrary, 188, 1 Fed. 745, 1 Cumming, Cas. Priv. Corp. 284.

⁶⁵ *In re Cork & Y. Ry. Co.*, 4 Ch. App. 748, 1 Cumming, Cas. Priv. Corp. 285. See, also, *In re National Permanent Benefit Building Soc.*, 5 Ch. App.

ties of the company are not increased, and it is not to be applied where the money borrowed does not go to pay valid debts of the company.⁶⁶ But it is applicable as well where the money is applied to the payment of debts accruing subsequent to the borrowing as when it is applied to debts then existing.⁶⁷ "The test is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains, in substance, unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the principle of equity that those who pay legitimate demands, which they are bound in some way or other to meet, and have had the benefit of other people's money, advanced to them for that purpose, shall not retain that benefit, so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan, nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing."⁶⁸

The Doctrine Allowing a Recovery on an Ultra Vires Contract.

In New York, New Jersey, Pennsylvania, Michigan, Indiana, Minnesota, and many other states, the doctrine that the ultra vires contracts of a corporation are so far contrary to the public policy and unlawful that they cannot form the foundation of an action, except as heretofore shown, is to a large extent abandoned. And the doctrine in these states is, to use the language of the New York court in a leading case, that "the plea of ultra vires should not, as a general rule, prevail, whether it is interposed for or against the corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."⁶⁹ This is clearly the better doctrine, and is supported by

309, 1 Cumming, Cas. Priv. Corp. 274; Wenlock v. River Dee Co., 19 Q. B. Div. 155, 1 Cumming, Cas. Priv. Corp. 277, 10 App. Cas. 354. Cf. In re Wrexham, etc., L. R. [1899] 1 Ch. 440.

⁶⁶ In re National Permanent Benefit Building Soc., supra; In re Wrexham, etc., R. Co., supra.

⁶⁷ Wenlock v. River Dee Co., supra.

⁶⁸ Per Lord Selborne in Blackburn Building Soc. v. Cunliffe, 22 Ch. Div. 61, 71.

⁶⁹ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cumming, Cas. Priv. Corp. 253; Kadish v. Association, 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256; Portland L. & M. Co. v. City of East Portland, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290; Lewis v. American Savings & L. Ass'n, 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559; Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115; International Trust Co. v. Davis & Farnum Mfg. Co., 70 N. H. 118, 46 Atl. 1054; Bear River Valley Orchard Co. v. Hanley, 15 Utah,

the great weight of decision in this country. Want of authority, as was pointed out by Comstock, C. J., in a New York case, may render a contract void; but mere want of authority, without more, does not render a contract illegal, so that it can under no circumstances give rise to an action. Contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim "*Ex turpi causa non oritur actio*," can have no application.

A promise by a corporation, therefore, founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted by its charter, and therefore ultra vires, is not illegal,⁷⁰ and there is no good reason why it should not be held that causes of action may arise out of it. "A transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality, so as to avoid the contract or dealing on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of private or criminal law, but, on the contrary, are innocent and lawful in themselves."⁷¹

506, 50 Pac. 611; *Usher v. New York Cent. & H. R. Co.* (Sup.) 78 N. Y. Supp. 508, affirmed 179 N. Y. 544, 71 N. E. 1141; *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85; *Id.*, 95 Minn. 206, 103 N. W. 1032; and cases cited in the following notes.

⁷⁰ Per Comstock, C. J., in *Bissell v. Railroad Co.*, 22 N. Y. 259, 1 Cumming, Cas. Priv. Corp. 187, 193. Compare the opinion of Selden, J., in this case. See, also, *American Nat. Bank v. National Wall Paper Co.*, 77 Fed. 85, 23 C. C. A. 33; *Seeber v. Commercial Nat. Bank (C. C.)* 77 Fed. 957. A corporation which has leased to another its property for a consideration of which it has received the benefit cannot, in an action to restrain it from taking possession of the property for an alleged breach of the covenants of the lease, set up as a defense that the execution of the lease was ultra vires as to the parties to it. *Pittsburgh, etc., R. Co. v. Altoona & B. C. R. Co.*, 196 Pa. 452, 46 Atl. 431.

⁷¹ Per Comstock, C. J., in *Bissell v. Railroad Co.*, *supra*. It was further said: "The words 'ultra vires' and 'illegality' represent totally different and distinct ideas. It is true that a contract may have both of these defects, but it may also have one without the other. For example, a bank has no authority to engage in benevolent enterprises. A subscription, made by authority of the board of directors, and under the corporate seal, for the building of a church or college, or an almshouse, would be clearly ultra vires, but it would not be illegal. If every corporation should expressly assent to such an application of the funds, it would still be ultra vires, but no wrong would be committed, and no public interest violated. So a manufacturing corporation may purchase ground for a schoolhouse or a place of worship for the intellectual, religious, and moral improvement of its operatives; it may buy tracts and books of instruction for distribution among them. Such dealings are outside of the charter; but, so far from being illegal or

In accordance with this view, it is held in most states that, if a contract entered into by a corporation is objectionable merely because it is in excess of the powers conferred upon the corporation by its charter, not being otherwise contrary to law, and it has been so far performed or acted upon by one of the parties that it would be inequitable to hold the contract void, the other party cannot defeat an action brought on the contract itself by setting up the defense that it was ultra vires.¹² Thus it has been held that if a corporation enters into an ultra vires contract to purchase goods, and the goods are delivered to it, so that it receives the benefit of the contract, the other party may maintain an action on the contract itself for the price

wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although ultra vires, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business."

¹² *Bissell v. Railroad Co.*, 22 N. Y. 259, 1 Cumming, Cas. Priv. Corp. 187; *Parish v. Wheeler*, 22 N. Y. 494, 2 Cumming, Cas. Priv. Corp. 58; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cumming, Cas. Priv. Corp. 253; *Holmes & Griggs Manuf'g Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; *Day v. Buggy Co.*, 57 Mich. 151, 23 N. W. 628, 58 Am. Rep. 352, 1 Cumming, Cas. Priv. Corp. 261; *Carson City Sav. Bank v. Carson City El. Co.*, 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454; *Camden & A. R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. Law, 530, 7 Atl. 523; *Chicago & A. Ry. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; *City of Corpus Christi v. Central Wharf & Warehouse Co.*, 8 Tex. Civ. App. 94, 27 S. W. 803; *Steger v. Davis*, 8 Tex. Civ. App. 23, 27 S. W. 1068; *Wright v. Pipe Line Co.*, 101 Pa. 204, 47 Am. Rep. 701; *Seymour v. Society*, 54 Minn. 147, 55 N. W. 907; *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; *Union Hardware Co. v. Plume & Atwood Manuf'g Co.*, 58 Conn. 219, 20 Atl. 455; *International Trust Co. v. Davis & F. Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054; *Flint & W. Mfg. Co. v. Kerr-Murray Mfg. Co.*, 24 Ind. App. 350, 56 N. E. 858; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 58 Kan. 175, 48 Pac. 847; *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74; *Board of Trustees of Charlotte Tp. v. Piedmont Realty Co.*, 134 N. C. 41, 46 S. E. 723; *Arkadelphia Lumber Co. v. Posey*, 74 Ark. 377, 85 S. W. 1127; *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79. The earlier Illinois cases have been supposed to be in accordance with this doctrine. See *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Darst v. Gale*, 83 Ill. 137; *Eckman v. Chicago, B. & Q. Ry. Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750. But in *National Home B. & L. Ass'n v. Home Sav. Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245, it was held that the rule estopping a corporation from raising the question of ultra vires where it has received the benefit of the contract does not apply where the contract is ultra vires in the sense that it is without the scope of the powers of the corporation. See, also, *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713.

agreed upon.⁷³ So it has been held that, if the price has been paid under an ultra vires contract for the purchase of goods, an action may be maintained on the contract for failure to deliver the goods. So, if a corporation borrows money for an unauthorized purpose, and gives its note or other obligation therefor, it cannot set up the ultra vires character of the contract to defeat an action thereon.⁷⁴ And the same rule applies where a corporation lends money or furnishes other consideration under an ultra vires contract, and takes the other party's note therefor. The other party cannot set up the ultra vires character of the contract to defeat an action by the corporation.⁷⁵

On the same principle it has been held that if a corporation engages in the business of an innkeeper, it cannot escape an innkeeper's liability to a guest, as for property lost, by setting up that the business was not authorized by its charter.⁷⁶ So where a street-railway company agreed to pay a certain sum if the state board of agriculture would hold the state fair at a certain place, it was held that the company could not set up the defense of ultra vires to defeat liability on its contract, after the fair was held at the place agreed upon, and it had the benefit therefrom in its increased traffic.⁷⁷ So where a fire insurance company which had issued a policy of insurance against loss of crops caused by hail, and received the premium, sought to escape liability for a loss on the ground that it had no power to insure against loss by hail, the court held that the defense should not be allowed.⁷⁸ So, where a corporation has entered into a partnership, and the other partner has fully performed, it must account.⁷⁹

⁷³ *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Dewey v. Railroad Co.*, 91 Mich. 351, 51 N. W. 1063; *Towers Excelsior & Ginnery Co. v. Inman*, 96 Ga. 506, 23 S. E. 418; and other cases in note 72, *supra*.

⁷⁴ *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; 1 Cumming, Cas. Priv. Corp. 249, W. D. Smith, Cas. Corp. 137, Shep. Cas. Corp. 68.

⁷⁵ *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 378, 2 Cumming, Cas. Priv. Corp. 55; *Logan v. Association*, 8 Tex. Civ. App. 490, 28 S. W. 141; *Gorrell v. Insurance Co.*, 11 C. C. A. 240, 63 Fed. 371; *Poock v. Association*, 71 Ind. 357; *Pancoast v. Insurance Co.*, 79 Ind. 172.

⁷⁶ *Magee v. Improvement Co.*, 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199.

⁷⁷ *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702, 1 Cumming, Cas. Priv. Corp. 222.

⁷⁸ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, 1 Cumming, Cas. Priv. Corp. 227. In an action by a member of a building association on his matured certificate, it was no defense that defendant was unauthorized by the statute under which it was organized to make a contract to pay a fixed sum thereon at maturity of the certificate. *Vought v. Eastern Bldg. & L. Ass'n*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761.

⁷⁹ *Boyd v. American Carbon-Black Co.*, 182 Pa. 206, 37 Atl. 937.

Same—Action Maintainable by the Corporation.

According to this doctrine, as shown by the illustrations referred to in the preceding paragraph, the right of action is not limited to the other party to the contract, but the corporation may maintain an action where it has performed its part of the contract. "It is very well settled," said the New York court in a leading case, "that a corporation cannot avail itself of the defense of ultra vires when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. * * * The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation."⁸⁰

Same—Necessity for Performance by the Plaintiff.

The courts which hold this doctrine require that there shall have been some performance on the part of the plaintiff which will render it unjust and inequitable to permit the defendant to set up the ultra vires character of the contract in defense. They will not lend their aid to enforce an ultra vires contract that is wholly executory.⁸¹ And the fact that the contract has been partly performed on one or both sides does not always require enforcement as to the residue. It will not be enforced unless its enforcement is necessary to do justice. Thus, where a corporation empowered to purchase material for manufacturing purposes purchased a quantity of material for the purpose of selling it again on speculation, the seller knowing of its purpose, it was held that the contract was void; that either party could repudiate it after part performance by both parties, and on repudiation of it by the seller, and in a suit by him to recover the value of the material already delivered, the corporation could not recover damages for his failure to perform the residue.⁸²

Same—The Ground of This Doctrine.

This doctrine is generally said to rest upon an equitable estoppel. "We are aware that the courts have been very slow to concede that

⁸⁰ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 1 Cumming, Cas. Priv. Corp. 253. See, also, Bath Gas L. Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; Bond v. Terrell Cotton & W. Mfg. Co., 82 Tex. 309, 18 S. W. 691; Eckman v. Chicago, B. & Q. R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750.

⁸¹ Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14, 1 Cumming, Cas. Priv. Corp. 293; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Bosshardt & Wilson Co. v. Crescent Oil Co., 171 Pa. 109, 32 Atl. 1120.

⁸² Day v. Buggy Co., 57 Mich. 151, 23 N. W. 628, 58 Am. Rep. 352, 1 Cumming, Cas. Priv. Corp. 261.

a defendant, setting up as a defense the ultra vires of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts would avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid; the party seeking to avoid it not being permitted to attack its character in this respect."⁸³ The use of the term "estoppel," however, is open to criticism.⁸⁴ A person dealing with a corporation is charged with notice of the limitations of its powers,⁸⁵ and it is not easy to raise an estoppel in his favor.⁸⁶ It is still more difficult to raise an estoppel in favor of the corporation, which cannot have been misled by the other party to the ultra vires contract in respect to its own powers.

The reasons by which the courts have been influenced, however, are obvious. It was said by Chief Justice Comstock: Commercial manufacturing, and trading corporations "are brought into relation with almost every member of the community, and I think it greatly to be desired that in laying down the rules of law which are to govern in such relations, we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men."⁸⁷ It would be carrying the doctrine concerning ultra vires contracts to an unwarranted extent, said the Indiana court, "to hold that a corporation might obtain the money of another, and, with the fruits of the

⁸³ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, 1 Cumming, Cas. Priv. Corp. 227.

⁸⁴ See 9 Harv. L. R. 269; 14 Harv. L. R. 337.

⁸⁵ Ante, p. 173. But see *Denver Fire Ins. Co. v. McClelland*, supra, where Stone, J., observes that "this constructive notice is of a very vague and shadowy character." See, also, *Bissell v. Railroad Co.*, 22 N. Y. 259, where Comstock, J., observes that "a traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations," in order to satisfy himself that the railroad companies are not operating their railroads in an ultra vires manner.

⁸⁶ But in *Voris v. Star City Building & L. Assn.*, 20 Ind. App. 630, 50 N. E. 779, it is said: "One who deals with a corporation is presumed to know the powers and limitations of its authority, and hence is estopped to plead its want of authority."

⁸⁷ Per Comstock, C. J., in *Bissell v. Railroad Co.*, 22 N. Y. 259, 1 Cumming, Cas. Priv. Corp. 187, 199.

contract in its treasury, interpose the defense of ultra vires; or, having used the money with the consent or acquiescence of its stockholders, ask that the lender be restrained from collecting it back, on the ground that the money was obtained in violation of the charter of the corporation. Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of ultra vires unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act ultra vires, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed." ⁸⁸ "There are few rules," said Chief Justice Gilfillan, "better settled or more strongly supported by authorities, with fewer exceptions, in this country, than that when a contract by a private corporation, which is otherwise unobjectionable, has been performed on one side, the party which has received and retained the benefits of such performance shall not be permitted to evade performance on the ground that the contract was in excess of the purpose for which the corporation was created. The rule may not be strictly logical, but it prevents a great deal of injustice." ⁸⁹

In dealing with ultra vires contracts it might have been possible for the courts to adhere to the doctrine that an ultra vires contract is void because of the corporation's inherent limitations, or, in the language of Mr. Justice Gray, that an ultra vires contract is "unlawful and void * * * because the corporation, by the law of its creation, is incapable of making it." ⁹⁰ Such is the doctrine, indeed, declared by the federal courts, although, as we have seen, they have not always found it possible to adhere to it.⁹¹ Again, it might have been possible to treat ultra vires contracts as illegal, on the ground

⁸⁸ Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412. "The rule requiring the observance of good faith and fair dealing is as applicable to corporations as to individuals. Neither can involve others in onerous engagements, and, with the consideration of the contract in their possession, disavow their acts, to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract." Louisville, N. A. & C. Ry. Co. v. Flannagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674. And see Field v. Eastern Building & L. Ass'n, 117 Iowa, 90, 90 N. W. 717.

⁸⁹ Seymour v. Chicago Guaranty F. L. Soc., 54 Minn. 147, 55 N. W. 907.

⁹⁰ Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

⁹¹ Ante, p. 172.

that a corporation is prohibited from exercising any power which its charter does not expressly or impliedly authorize; but this view has not commended itself to the courts.⁹² On the other hand, it might have been possible to hold that lack of authorization is not equivalent either to incapacity or to statutory prohibition rendering the contract illegal, and that consequently a corporation has the same power to contract as a natural person, subject only to the right of the state to maintain proceedings directly against the corporation to enforce a forfeiture of its charter for misuser of its powers.⁹³ In this view, all corporate contracts, including executory contracts, in the absence of objections by stockholders and creditors, would be enforced, unless they were unlawful in the sense that contracts between individuals may be unlawful. But no court has committed itself to this doctrine, and, while the tendency of the courts is to enforce ultra vires contracts which have been performed by one side when the enforcement will advance justice,⁹⁴ all courts refuse to enforce ultra vires contracts which are purely executory.⁹⁵ This apparent inconsistency is no doubt to be explained by the views of public policy generally entertained by the courts. They deem it unsafe to rely upon the power of the state to enforce a forfeiture of the charter as the sole means of protecting the interest of the public in keeping a corporation within the limits which its charter imposes upon it, and for this reason they refuse, as a rule, to enforce ultra vires contracts; but, if the contract has been fully performed on one side, this consideration is outweighed by other considerations of public policy based upon the demands of justice.⁹⁶

⁹² "The term 'illegal,' which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word 'illegal,' as applied to contracts of corporations ultra vires only, has been frequently alluded to." *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664.

⁹³ See the Unauthorized or Prohibited Exercise of Corporate Power, by George Wharton Pepper, 9 Harv. L. R. 255.

⁹⁴ Ante, p. 178.

⁹⁵ Ante, p. 171.

⁹⁶ See 9 Harv. L. R. 255; 18 Harv. L. R. 461; 19 Harv. L. R. 608. "We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the

Same—Specific Performance.

It has been held that a court of equity will not compel specific performance of an ultra vires contract, even though it may have been partly performed by the complainant. In a Michigan case, a bank had entered into an ultra vires contract to purchase land from a third person, and sell it to the defendant. After the land had been purchased by the bank, the defendant refused to carry out the contract, and the bank brought suit in equity for specific performance. The court held that the relief could not be granted, as it could not, consistently with equitable principles, assist the bank to carry into execution a contract to violate its charter, and that the purchase of the property by the bank after the contract was made could make no difference. "Equity," it was said, "will aid no one in doing that which is unlawful."⁹⁷

Assent of Shareholders.

If the doctrine of ultra vires is strictly applied, it must follow that an ultra vires contract, being void, cannot be rendered binding upon the corporation by the assent or ratification of all the shareholders.⁹⁸

The contract cannot be ratified by either party, because it could not have been authorized by either.⁹⁹ "It is unnecessary to consider the effect of dissentient shareholders," it has been said, "for, if the company is a corporation only for a limited purpose and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds."¹⁰⁰ On the other hand, a stockholder may be precluded from obtaining relief against an ultra vires transaction if he has assented to it, or by his acquiescence in it, and to that extent he is estopped from objecting to

lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust." *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664.

⁹⁷ *Bank of Michigan v. Niles*, Walk. Ch. (Mich.) 99; *Id.*, 1 Doug. (Mich.) 401, 41 Am. Dec. 575, 1 Cumming, Cas. Priv. Corp. 291. And see *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513.

⁹⁸ *Steiner v. Steiner Land & L. Co.*, 120 Ala. 128, 26 South. 494.

⁹⁹ *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. And see *East Anglian Rys. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, 1 Cumming, Cas. Priv. Corp. 142; *Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, 1 Cumming, Cas. Priv. Corp. 152; *Thomas v. Railroad Co.*, 101 U. S. 71, 1 Cumming, Cas. Priv. Corp. 164; *Germania Safety-Vault & Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. 797.

¹⁰⁰ Per *Jarvis*, C. J., in *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, *supra*.

it.¹⁰¹ "A corporation may do acts which affect the public to its harm, inasmuch as they are per se illegal or are *malum prohibitum*," said Folger, J., in a leading case.¹⁰² "Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of stockholders. They may be good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in reliance on those acts." And in accordance with this view some courts, discarding the view that a corporation cannot do any act in excess of its express or implied powers, have held that in a case where the rights of the state or of the public are not otherwise involved, and where the rights of creditors are not concerned, as where none exist, and all the stockholders have assented, a plea on the part of the corporation that a contract is *ultra vires* cannot be sustained.¹⁰³ Thus it has been held that, while accommodation paper given by a corporation is not valid as against corporate creditors or dissenting stockholders, a corporation cannot be heard to plead that an accommodation note given with the consent of all the stockholders, the corporate creditors not being injured, was *ultra vires*.¹⁰⁴

ILLEGAL CONTRACTS.

68. Contracts of a corporation may be illegal on other grounds than because they are *ultra vires*; that is, unlawful in the sense in which a contract by an individual may be unlawful. A contract which is illegal in this sense is subject to the same rules that govern illegal contracts by individuals. Generally, no action can grow out of it.

Contracts of corporations may not only be *ultra vires*, but like the contracts of an individual, they may, on other grounds, be illegal in the sense of the maxim, "*Ex turpi causa non oritur actio*." In the absence of express statutory provision to the contrary, a corporation can make no contract which would be illegal if it were made by an individual. Thus a contract by a corporation, like a contract by an individual, is illegal if it contemplates the publication of a libel, or a fraud upon third persons, or the doing of an act which is pro-

¹⁰¹ Post, p. 386.

¹⁰² Kent v. Quicksilver Mining Co., 78 N. Y. 159.

¹⁰³ Breslin v. Fries-Breslin Co., 70 N. J. Law, 274, 58 Atl. 818; Perkins v. Trinity Realty Co. (N. J. Ch.) 61 Atl. 167. See Taylor, Corp. §§ 269-274; Cook, Corp. § 3. And see cases in following note.

¹⁰⁴ Martin v. Niagara Falls Paper Co., 122 N. Y. 165, 25 N. E. 803; Perkins v. Trinity Realty Co., *supra*; Murphy v. Arkansas, etc., Co. (C. C.) 97 Fed. 723; Solomon Solar Salt Co. v. Barber, 58 Kan. 419, 49 Pac. 524.

hibited by statute under a penalty, or if it is contrary to public policy, as in the case of wagering contracts, contracts in restraint of trade, etc. A corporation authorized by its charter to engage in the business of manufacturing and selling an article or product, and to own the property necessary for that purpose, has no right to buy up the business and property of all the other persons and companies engaged in the business, for the purpose of obtaining a monopoly; and, if it does so, quo warranto proceedings may be maintained by the state to oust it from the exercise of its franchise.¹⁰⁵ The principles of law which apply to illegal contracts are substantially the same where the contract is by a corporation as where it is by an individual. The student, therefore, must refer in this connection to works on the general law of contracts.¹⁰⁶ There are a few questions that are peculiar to corporations.

Even in those jurisdictions where the ultra vires contracts of a corporation are not regarded as illegal in the sense that no action can be maintained upon them, unless there is an express prohibition in the charter or in some statute, there are some exceptions. An ultra vires contract that is not expressly prohibited will nevertheless be declared illegal if it is in its nature and effect clearly contrary to public policy. Thus it has been held in New York that a contract by which a bank, organized under the laws of the state, subscribes for or agrees to purchase stock in a railroad company, and so to be a stockholder therein, and subject to liability as such, is not merely ultra vires, but is illegal, though not expressly prohibited. "The spirit of the law," it was said, "as well as a sound public policy, forbid these institutions from risking the moneys intrusted to their care in doubtful speculations or enterprises."¹⁰⁷

Contracts Disabling Corporations from Performing Duties to the Public.

A railroad, steamboat, gas, water, or other like corporation can make no contract which will interfere with its performance of the duties which it owes to the public. Such a contract is not merely ultra vires. It is illegal, and absolutely void, as being contrary to public policy. It is a well-settled principle "that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the pub-

¹⁰⁵ *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; post, p. 238.

¹⁰⁶ See Clark, Cont. (2d Ed.) 321-342.

¹⁰⁷ *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14, 1 Cumming, Cas. Priv. Corp. 298.

lic grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy.”¹⁰⁸

Effect of Express Prohibition in Charter.

If the charter of a corporation, instead of merely not authorizing a certain contract, expressly prohibits it, the contract stands upon a different footing from one that is merely ultra vires. As a rule, it is illegal and void, and no action can be maintained upon it, or grow out of it. The maxim, “Ex turpi causa non oritur actio,” applies.¹⁰⁹ In *White v. Franklin Bank*¹¹⁰ the defendant had taken a deposit for a certain time, and promised to repay it at the expiration of that time, in violation of a statute declaring that no bank should make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain, etc. It was held that the transaction was illegal and void, because expressly prohibited by statute, and that no action could be maintained on the contract.

If the charter of a corporation, including statutes applicable to it, merely prohibits certain contracts, and does not declare that contracts in violation of the prohibition shall be void, and the purpose of the statute does not show an intention on the part of the legislature to make such contracts void, they are binding; and objection on the ground that they were prohibited can only be raised by the state in a direct proceeding against the corporation to forfeit its

¹⁰⁸ *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, 1 Cumming, Cas. Priv. Corp. 164, W. D. Smith, Cas. Corp. 132, Shep. Cas. Corp. 70. And see *York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. Ed. 27; *American Union Tel. Co. v. Union Pac. Ry. Co.* (C. C.) 1 McCrary, 188, 1 Fed. 745, 1 Cumming, Cas. Priv. Corp. 284; *Black v. Canal Co.*, 22 N. J. Eq. 890. In *Thomas v. Railroad Co.*, supra, one railroad company had leased its road to another, and the transaction was held illegal as against public policy. In *American Union Tel. Co. v. Union Pac. Ry. Co.*, supra, a railroad company, authorized to also construct and operate a telegraph line, leased the telegraph line to another corporation, and the lease was held illegal and void. In *Visalia Gas & Electric Light Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105, a contract by which a corporation organized to operate gas and electric light works leased them to another was held ultra vires, and void as against public policy.

¹⁰⁹ *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333; *White v. Bank*, 22 Pick. (Mass.) 181, 1 Cumming, Cas. Priv. Corp. 239; *In re Mutual Guar. Fire Ins. Co.*, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149.

¹¹⁰ 22 Pick. (Mass.) 181, 1 Cumming, Cas. Priv. Corp. 239.

charter.¹¹¹ The national banking act impliedly prohibits national banks from lending money on real estate. In *National Bank v. Matthews*¹¹² a loan was made by a national bank on a note secured by a deed of trust on real estate, and a maker of the note and grantor in the deed filed a bill in equity to enjoin a sale under the deed to satisfy the note. The supreme court of the United States, assuming the transaction to be within the prohibition, held that the statute, in prohibiting such a contract, did not make it void, and that the state only could object to the excess of power in a proceeding to forfeit the bank's charter. "We cannot believe," said the court, "it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact should occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress. This has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."¹¹³ So where a bank charter prohibited directors or other officers of the bank from borrowing money from the bank under penalty of fine and imprisonment, and an officer borrowed money from the bank in violation thereof, it was held that the claim of the bank to recover the loan was enforceable.¹¹⁴ So, where the charter or a statute limits the amount of indebtedness which a corporation may incur, it has been held that a debt contracted in excess of the amount is not void, although there are decisions to the contrary.¹¹⁵

¹¹¹ *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, 1 Cumming, Cas. Priv. Corp. 95; *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, 1 Cumming, Cas. Priv. Corp. 102; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Butterworth & Lowe v. Kritzer Milling Co.*, 115 Mich. 1, 72 N. W. 990.

¹¹² 98 U. S. 621, 25 L. Ed. 188, 1 Cumming, Cas. Priv. Corp. 95.

¹¹³ Mr. Justice Miller dissented, holding that it was the intention of congress to make such contracts void. The case was adhered to and followed in *National Bank v. Whitney*, *supra*.

¹¹⁴ *Lester v. Bank*, 33 Md. 558, 3 Am. Rep. 211.

¹¹⁵ *Beach v. Wakefield*, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197; *Sioux City Terminal R. & W. Co. v. Trust Co.* (Iowa Statute) 173 U. S. 99, 19 Sup. Ct. 341, 43 L. Ed. 628. *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134. Contra, *Bell & Coggeshall Co. v. Kentucky Glass Works Co.*, 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180. Where the articles of defendant corporation provided that the highest indebtedness it should at any time incur was \$1,000, and its secretary, with authority to borrow, executed its note and borrowed from plaintiff \$1,500 which the secretary embezzled, and defendant received no benefit, plaintiff could not recover the \$1,500, because it was in excess of the corporate powers, of which plaintiff

Effect of Illegality—Actions in Disaffirmance of Illegal Contract.

It is a well-settled doctrine of the law of contracts, that where money has been paid by one party to another under a contract that is illegal as involving moral turpitude, both parties being particeps criminis, no action can be maintained to recover it back. The same is true generally where the contract is illegal because prohibited by statute, or because contrary to public policy. The rules of law governing these cases may be thus stated:

In no case can an action be sustained to enforce the illegal agreement itself.¹¹⁶ And, as a general rule, where an illegal agreement has been executed in whole or in part by the payment of money, or the transfer of property, or rendition of services, the court will not lend its aid to enable the party, even in disaffirmance of the contract, to recover back the money, or to recover the value of the goods or services.¹¹⁷ The latter rule is subject to some exceptions.¹¹⁸

In some cases, where the contract is merely *malum prohibitum*, a *locus poenitentiae* remains, and while the prohibited promise is unperformed money or goods delivered in consideration of it may be recovered. This exception is not at all peculiar to contracts of corporations.¹¹⁹

Again, where the contract is only illegal because prohibited by statute, and the parties are not in *pari delicto*, the one who is less

was chargeable with notice; but as he was not guilty of bad faith, and the contract was not in violation of any positive law, and did not involve moral turpitude or any consideration of public policy, the transaction was void only as to the excess, and he might recover to the amount of \$1,000, as for money loaned. *Kranlger v. People's Building Soc.*, 60 Minn. 94, 61 N. W. 904.

¹¹⁶ *Clark, Cont.* (2d Ed.) 336. See *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302; *Chicago, I. & L. Ry. Co. v. Southern Indiana Ry. Co.* (Ind. App.) 70 N. E. 843.

¹¹⁷ *Clark, Cont.* (2d Ed.) 336.

¹¹⁸ In New York it is held that where a corporation discounts commercial paper without authority it may recover the money loaned, though the securities are void. "It is no doubt the general rule of law," said the court in such a case, "that no right of action can spring out of an illegal contract. And the rule that an illegal contract cannot be enforced applies as well to contracts *malum prohibitum* as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve the parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and, if justice and equity require a restoration of money or property received by either party thereunder, it will, and in many cases has, given relief." *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

¹¹⁹ *Clark, Cont.* (2d Ed.) 338.

guilty may disaffirm the contract, and recover what he has parted with. Such is the case where the party asking relief was induced to enter into the contract under the influence of fraud or duress.¹²⁰ So it is, also, where the statutory prohibition was intended for the protection of the party asking relief.¹²¹ As illustrating this principle may be mentioned cases in which banks or other corporations are prohibited from issuing notes, bills, or other securities. It is held by some courts in these and similar cases that the prohibition is intended to protect the public against the prohibited securities, that the corporation is the only offender, and that the persons who receive them may recover the money paid for them, not being in *pari delicto*. "The corporation issuing the bills contrary to law and against penal sanction is deemed more guilty than the members of the community who receive them, whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them."¹²²

Most courts hold that where the direct object of a contract is innocent in itself, but the intention of one of the parties is unlawful,—as where goods are bought or money borrowed to be used for an unlawful purpose, which is not *malum in se*,—the fact that the other party knows of the unlawful purpose does not render the agreement illegal, so as to prevent his maintaining an action thereon, unless it is made part of the contract that the money or goods shall be used for such purpose, or unless he has done something in aid or furtherance of the unlawful design beyond merely entering into the contract.¹²³ And this principle has been applied to contracts with a corporation, where the corporation intended to use the money or goods obtained by it under the contract for an illegal purpose.¹²⁴

¹²⁰ Clark, Cont. (2d Ed.) 340.

¹²¹ Clark, Cont. (2d Ed.) 341. *Thomas v. City of Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *White v. Bank*, 22 Pick. (Mass.) 181; 1 Cumming, Cas. Priv. Corp. 239; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, 2 Cumming, Cas. Priv. Corp. 67; *Onelda Bank v. Ontario Bank*, 21 N. Y. 490.

¹²² *Thomas v. City of Richmond*, *supra*.

¹²³ Clark, Cont. (2d Ed.) 327-332, where the cases are collected, and the conflict in the decisions of the different states is pointed out.

¹²⁴ *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, 2 Cumming, Cas. Priv. Corp. 67. And see *Curtis v. Leavitt*, 15 N. Y. 91.

CHAPTER VII.

POWERS AND LIABILITIES OF CORPORATIONS (Continued).

69. Liability for Torts.

70-72. Responsibility for Crime—Contempt of Court.

LIABILITY FOR TORTS.

69. A private corporation is liable for the torts of its servants and agents committed in the course of their employment, to the same extent as a natural person would be. And it may be liable for wrongs involving a mental element, as malicious wrongs, fraud, etc.

At one time it was doubted whether a corporation could be sued for a tort, but it is now settled that it may be liable for torts to the same extent as a natural person would be under the same circumstances. It is said that a corporation has no power to do an act not authorized by its charter, and, as we have seen, this is true in a sense; but it is not meant by this that it cannot do wrong.¹ The word "power" is used in the sense of "authority." A corporation has no right to exceed the powers conferred upon it, but it has the capacity to do so; and if, in doing so, it commits a tort, it is as fully liable as a natural person would be under similar circumstances.² "Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of ultra vires has no application."³ The maintenance of a ferry by an educational corporation is ultra vires. The corporation is nevertheless

¹ Ante, p. 161; post, p. 198.

² *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675, 1 Cumming, Cas. Priv. Corp. 431; *Goodspeed v. Bank*, 22 Conn. 530, 58 Am. Dec. 439, 1 Cumming, Cas. Priv. Corp. 443; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. Law, 137, 54 Am. Rep. 123, 2 Cumming, Cas. Priv. Corp. 110; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202, 16 L. Ed. 73, 1 Cumming, Cas. Priv. Corp. 453, *Shep. Cas. Corp.* 144; *Yarborough v. Bank*, 16 East, 6, 1 Cumming, Cas. Corp. 426; *Hutchinson v. Railroad Co.*, 6 Helsk. (Tenn.) 634, 2 Cumming, Cas. Priv. Corp. 102; *Maund v. Canal Co.*, 4 Man. & G. 452, 1 Cumming, Cas. Priv. Corp. 429; *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314, 1 Cumming, Cas. Priv. Corp. 434; *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290, 1 Cumming, Cas. Priv. Corp. 440; *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; *Mersey Docks & Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93.

³ *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008. But see *Gunn v. Railroad Co.*, 74 Ga. 509, 2 Cumming, Cas. Priv. Corp. 111.

liable for injuries to a passenger being transported thereon for hire, caused by the negligence of the employé in charge.⁴ As we shall see in a subsequent chapter, some courts do not hold a corporation liable for torts of employés in ultra vires transactions.⁵

A corporation, being impersonal, cannot personally commit a tort. It can act only through an agent, but for torts committed by its agents and servants it is liable in the same manner as a natural person is liable for the torts of his agents and servants. "Wherever they can competently do or order any act to be done on their behalf, * * * they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others."⁶ Thus a corporation may be liable in trover for the conversion of goods;⁷ in trespass quare clausum fregit;⁸ in trespass de bonis asportatis;⁹ in trespass for assault and battery, false imprisonment, etc.;¹⁰ in case for obstructing, diverting, or polluting a water course;¹¹ and for nuisances generally.¹²

Liability in tort will also attach to a corporation for the negligence of its servants or agents in omitting to perform a duty resting upon the corporation.¹³ And it may be liable for negligence in the performance of acts by its servants or agents. Thus it may be liable for negligence in the custody or use of a vicious dog, or other animate instru-

⁴ *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467.

⁵ Post, p. 514.

⁶ *Yarborough v. Bank*, 16 East, 6, 1 Cumming, Cas. Priv. Corp. 426.

⁷ *Yarborough v. Bank*, supra; *Beach v. Bank*, 7 Cow. (N. Y.) 485. Trespass for mesne profits. *McOready v. Guardians of the Poor*, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

⁸ *Maund v. Canal Co.*, 4 Man. & G. 452, 1 Cumming, Cas. Priv. Corp. 429.

⁹ *Maund v. Canal Co.*, supra.

¹⁰ *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314, 1 Cumming, Cas. Priv. Corp. 434; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. Law, 137, 54 Am. Rep. 123, 2 Cumming, Cas. Priv. Corp. 110; *Wheeler & W. Manuf'g Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; *Moore v. Railroad Corp.*, 4 Gray (Mass.) 465, 64 Am. Dec. 83; *Krulevitz v. Railroad Co.*, 140 Mass. 573, 5 N. E. 500; *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; *Id.*, 3 N. M. (Johns.) 109, 2 Pac. 369; *Southern Ex. Co. v. Platten*, 93 Fed. 936, 36 C. C. A. 46.

¹¹ *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675, 1 Cumming, Cas. Priv. Corp. 431.

¹² *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

¹³ *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; *Riddle v. Proprietors of the Locks, etc.*, 7 Mass. 169, 5 Am. Dec. 35; *Mersey Docks & Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. 93; *Hutchinson v. Railroad Co.*, 6 Helsk. (Tenn.) 634, 2 Cumming, Cas. Priv. Corp. 102; *Townsend v. Turnpike Road*, 6 Johns. (N. Y.) 90; *Hooker v. New Haven & N. Co.*, 14 Conn. 146, 36 Am. Dec. 477.

mentality, or of powder, poison, or other inanimate instrumentality. A railroad company is liable in tort for negligence in the running or management of its trains, or for keeping its premises in an unsafe condition. And any other private corporation which keeps its premises in an unsafe condition will be liable for injuries caused thereby.¹⁶

It has been contended that, since a corporation is merely an artificial being, without mind or soul, it cannot commit a tort involving a mental operation, and that it cannot, therefore, be liable for malicious wrongs, or wrongs involving a specific intent, such as libel, malicious prosecution, or fraud.¹⁷ It is now well settled, however, that the mental attitude of its agents, like their acts, may be imputed to a corporation, and that a corporation may be guilty of malice in contemplation of law.¹⁸ Corporations, therefore, have been held liable for a libel published by their agents;¹⁹ for a malicious criminal prosecution;²⁰ for a malicious and vexatious attachment;²¹ and for conspiracy;²² and corporations have repeatedly been held liable for false representations

¹⁶ See cases cited above.

¹⁷ *Childs v. Bank*, 17 Mo. 213.

¹⁸ 1 Jagg. Torts, 168; *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290, 1 Cumming, Cas. Priv. Corp. 440; *Goodspeed v. Bank*, 22 Conn. 530, 58 Am. Dec. 439, 1 Cumming, Cas. Priv. Corp. 443; *Merrills v. Manufacturing Co.*, 10 Conn. 384, 27 Am. Dec. 682. See *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, Shep. Cas. Corp. 153.

¹⁹ *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73, 1 Cumming, Cas. Priv. Corp. 453, Shep. Cas. Corp. 144; *Bacon v. Railroad Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543. It has been said that one cannot commit slander by deputy, and hence that a corporation cannot commit slander. See 1 Jagg. Torts, 170. But it would seem that a corporation is liable for slander, provided authorization or ratification can be shown. *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284, 4 S. E. 905, 12 Am. St. Rep. 255. Where a corporation authorized its state agent to make a settlement with a subagent, it was not liable to the latter for slanderous statements made by the former pending the settlement, in the absence of evidence that the corporation expressly or impliedly authorized the statements or ratified them. *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392. And see *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692; *International Text-Book Co. v. Heartt*, 136 Fed. 129, 69 C. C. A. 127.

²⁰ *Turner v. Insurance Co.*, 55 Mich. 236, 21 N. W. 326; *Krulevitz v. Railroad Co.*, 140 Mass. 573, 5 N. E. 500; *Reed v. Bank*, 130 Mass. 445, 39 Am. Rep. 468; *Copley v. Machine Co.*, 2 Woods, 494, Fed. Cas. No. 3,213.

²¹ *Goodspeed v. Bank*, 22 Conn. 530, 58 Am. Dec. 439, 1 Cumming, Cas. Priv. Corp. 443; *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786.

²² *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 826; *Hindman v. First Nat. Bank*, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; *West Virginia Trans. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895.

made by their agents. The rule is well settled that, in cases of fraud, a corporation will be liable whenever an individual would be held liable.²³

In *Green v. London General Omnibus Co.*,²⁴—a leading English case,—the plaintiff was the proprietor of an omnibus line engaged in the carriage of passengers, and the defendant was a corporation and the proprietor of a rival line. The declaration sought to recover damages for acts alleged to have been wrongfully and maliciously done by the defendant for the purpose of obstructing, and which did obstruct, the plaintiff in his business; such as the intentional driving of the defendant's vehicles against those of the plaintiff. The defendant demurred on the ground that a corporation could not be guilty of a willful and intentional wrong; but the court held that the declaration was good. In *Goodspeed v. East Haddam Bank*,²⁵—a leading case in this country,—the action was brought against a bank for maliciously prosecuting a vexatious suit, and it was held that the action could be maintained.²⁶

Exemplary Damages.

A corporation may not only be held liable for actual damages resulting from a malicious wrong, but it may also, like a natural person, be held liable for exemplary damages. A corporation, however, can act only through an agent, and the same disagreement exists in respect to the liability of corporations as in respect to the liability of individual principals and masters, where the wrongful act was not authorized,

²³ *Barwick v. Bank*, L. R. 2 Exch. 259; *Nevada Bank of San Francisco v. Portland Nat. Bank* (C. C.) 59 Fed. 338; *Cragle v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; *Shaw v. Mining Co.*, 13 Q. B. Div. 103; *Tome v. Railroad Co.*, 39 Md. 36, 17 Am. Rep. 540; *Hindman v. First Nat. Bank*, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210.

²⁴ 7 C. B. (N. S.) 290; 1 Cumming, Cas. Priv. Corp. 440.

²⁵ 22 Conn. 530, 58 Am. Dec. 439, 1 Cumming, Cas. Priv. Corp. 443.

²⁶ It was said by Church, C. J., in this case: "The claim is that, as a corporation is ideal only, it cannot act from malice, and therefore cannot commence and prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance every day. And if they can have any motive, they can have a bad one; they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank in the usual modes of its action, and still to claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application."

ratified, or participated in by them.²⁷ Many cases hold that a corporation cannot be held liable for exemplary damages by reason of wanton, oppressive, or malicious conduct on the part of its servant or agent, unless the corporation, by its managing officers, has authorized, ratified, or participated in the wrong, or is otherwise chargeable with gross misconduct in the matter.* Other cases hold that a corporation may be held liable for exemplary damages by reason of such conduct on the part of its servant or agent irrespective of such authorization, ratification, participation, or misconduct on the part of the managing officers.†

Authority of Servant or Agent.

A corporation is liable for the acts of its servants and agents, including their wrongful acts, on the same principles, and to the same extent only, as a natural person is liable for the acts of his servant or agent. If a corporation expressly authorizes its servant or agent to do a particular act, there can be no question as to its liability. Thus, if a majority of the stockholders should by vote direct an agent to enter unlawfully upon the land of another, the corporation would clearly be liable in trespass. Difficulties arise in those cases where the authority of the agent is to be implied. It is the general rule that a corporation,

²⁷ See *Tiffany*, Ag. 275.

* *Cleghorn v. New York Central R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; *Hagan v. Railroad Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Malsenbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; *Warner v. Pacific Co.*, 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327; *Bingham v. Lipman, Wolfe & Co.*, 40 Or. 363, 67 Pac. 98. "Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite. It must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." Per Church, C. J., in *Oleghorn v. New York Central R. Co.*, supra.

† *Baltimore, etc., Ry. v. Barger*, 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319; *Hoboken Printing & P. Co. v. Kahn*, 59 N. J. Law, 218, 35 Atl. 1053, 59 Am. St. Rep. 585; *Goddard v. Grand Trunk Ry.*, 57 Me. 202, 2 Am. Rep. 39; *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

like a natural person, is liable for any act of its servant or agent that is committed in the conduct of its business, and in the course of his employment. This rule will be considered in treating of the liability of a corporation for the acts of its agents.²⁸

RESPONSIBILITY FOR CRIME—CONTEMPT OF COURT.

70. A corporation may be criminally responsible for omission to perform a duty imposed upon it by law, or for nonfeasance.

71. In most states, but not in all, it is held that it may be criminally responsible for some acts of misfeasance, such as maintaining a nuisance. But it cannot commit a crime which involves a mental operation, nor crimes involving an element of personal violence.

72. A corporation may be punished for contempt of court.

Nonfeasance.

Though there is dictum in some of the old cases to the contrary, it is now perfectly well settled that a corporation may be indicted for omission to perform a duty to the public imposed upon it by law, and, though it cannot be imprisoned, it may be fined, and deprived of its charter.²⁹ Thus a railroad company may be indicted and fined for failure to comply with a statute requiring it to keep a bridge in repair across a cut where its road crosses a public highway.³⁰

Misfeasance.

It has been held that a corporation cannot be indicted for misfeasance,—that it “can neither commit a crime or misdemeanor by any positive or affirmative act, nor incite others to do so.”³¹ Thus, in the case from which this quotation is taken, it was held in Maine that a corporation could not be indicted for maintaining a nuisance by obstructing a navigable river, though the obstruction was directed by a majority of the stockholders; but that the indictment should have been against the individuals.³²

²⁸ Post, p. 510.

²⁹ Clark, Or. Law (2d Ed.) 76; Reg. v. Railway Co., 3 Q. B. 223; New York & G. L. R. Co. v. State, 50 N. J. Law, 303, 13 Atl. 1, affirmed 53 N. J. Law, 244, 23 Atl. 168. In Anon., 12 Mod. 559, Case 935, it was said that “a corporation is not indictable, but the particular members of it are.” But it does not appear what the indictment was for.

³⁰ New York & G. L. R. Co. v. State, supra.

³¹ State v. Great Works Milling & Manufacturing Co., 20 Me. 41, 37 Am. Dec. 38; Com. v. President, etc., of Swift Run Gap Turnpike Co., 2 Va. Cas. 362; State v. Ohio & M. R. Co., 23 Ind. 362 (since changed by statute in Indiana. See State v. Baltimore, O. & C. R. Co., 120 Ind. 298, 22 N. E. 307). Cf. Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600.

³² State v. Great Works Milling & Manufacturing Co., supra.

The great weight of modern authority, however, is against this position, and to the effect that an indictment will lie against a corporation for misfeasance as well as for nonfeasance,⁸³ provided the offense involves no mental element, nor element of personal violence. Thus corporations have repeatedly been held liable for nuisance by obstructing a navigable river, or other public highway.⁸⁴ And an indictment has been sustained against a corporation for nuisance in keeping a disorderly house,⁸⁵ and for permitting gaming on its premises.⁸⁶ "Corporations" said the Massachusetts court, "cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury, or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them."⁸⁷

Offenses Involving Mental Element or Personal Violence.

We have seen that a corporation may be held liable in tort for malicious wrongs, such as libel and malicious prosecution, and for fraud,

⁸³ Olark, Cr. Law (2d Ed.) 77, 79; Reg. v. Great North of England Ry. Co., 2 Cox, Cr. Cas. 70; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; State v. Passaic Co. Agricultural Soc., 54 N. J. Law, 260, 23 Atl. 680; Com. v. Pulaski Co. Agricultural & Mechanical Ass'n, 92 Ky. 197, 17 S. W. 442.

⁸⁴ Reg. v. Great North of England Ry. Co., supra; Com. v. Proprietors of New Bedford Bridge, supra; Louisville & N. R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State v. Louisville & N. R. Co., 91 Tenn. 445, 19 S. W. 229; St. Louis, A. & T. Ry. Co. v. State, 52 Ark. 51, 11 S. W. 1035; State v. Chicago, M. & St. P. Ry. Co., 77 Iowa, 442, 42 N. W. 365, 4 L. R. A. 298; State v. Roanoke Railroad & Lumber Co., 109 N. C. 860, 13 S. E. 719; State v. Monongahela R. R. Co., 37 W. Va. 108, 16 S. E. 519; Chicago & E. I. R. Co. v. People, 44 Ill. App. 632; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; Northern Cent. R. Co. v. Com., 90 Pa. 305; Pittsburgh & Allegheny Bridge Co. v. Com. (Pa. Sup.) 8 Atl. 217; Palatka & I. R. R. Co. v. State, 23 Fla. 546, 3 South. 158, 11 Am. St. Rep. 395; Savannah, F. & W. Ry. Co. v. State, 23 Fla. 579, 3 South. 204; State v. Warren R. Co., 29 N. J. Law, 353; State v. Central R. Co., 32 N. J. Law, 220; State v. White, 96 Mo. App. 34, 69 S. W. 684.

⁸⁵ State v. Passaic Co. Agricultural Soc., 54 N. J. Law, 260, 23 Atl. 680.

⁸⁶ Com. v. Pulaski Co. Agricultural & Mechanical Ass'n, 92 Ky. 197, 17 S. W. 442. A corporation may be punished criminally for peddling through the medium of an unlicensed agent. Standard Oil Co. v. Com., 55 S. W. 8, 21 Ky. Law Rep. 1339. And see Crall v. Com., 103 Va. 855, 49 S. E. 638. Under a statute subjecting "any person" to penalties for having in his possession unauthorized copies of a copyrighted publication, corporations are included, and possession by an agent is the possession of the corporation. Falk v. Curtis Printing Co. (C. C.) 98 Fed. 989.

⁸⁷ Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339.

the malice or evil intent of its agent being imputed to it; and that it may also be held liable in a civil action for assault and battery; and that exemplary or punitive damages may be recovered in proper cases.³⁸ There is a strong tendency in some jurisdictions to extend this doctrine so as to include criminal prosecutions. Dr. Wharton says that there is no good reason why the same acts for which corporations are subject to civil suit may not equally be the basis of criminal proceedings, when they result in injury to the public at large.³⁹ And it has been said in a late New Jersey case, after adverting to the fact that a corporation is civilly liable for malicious wrongs: "It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and be mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public. That malice and evil intent may be imputed to corporations has been repeatedly adjudged."⁴⁰

There are no cases thus far in which a corporation has been held liable criminally for malicious wrongs, or for wrongs involving a specific evil intent, or for wrongs involving the element of personal violence. On the contrary, actual authority, as far as it goes, is against any such doctrine.⁴¹

Contempt of Court.

A corporation may be guilty of a contempt of court by reason of acts or omissions of its officers, as where they violate an injunction. And in such a case it is well settled that the court has the same power to punish it by a fine, as it would have in the case of a natural person.⁴²

³⁸ Ante, p. 196.

³⁹ 1 Whart. Cr. Law, § 87. A corporation may be indicted for libel. *State v. Atchinson*, 8 Lea (Tenn.) 729, 31 Am. Rep. 663; *Brennan v. Tracy*, 2 Mo. App. 543.

⁴⁰ *State v. Passaic Co. Agricultural Soc.*, 54 N. J. Law, 260, 23 Atl. 680. See, also, *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280. A corporation may be guilty of a crime when the only intention required is an intention to do the prohibited act, and therefore a corporation may be subject to a fine for violating the eight-hour law. *United States v. John Kelso Co.* (D. C.) 86 Fed. 304.

⁴¹ See *Clark*, Cr. Law (2d Ed.) 79; *Orr v. Bank*, 1 Ohio, 36, 13 Am. Dec. 588; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339.

⁴² *People v. Albany & V. R. Co.*, 12 Abb. Prac. (N. Y.) 171; *Golden Gate Consolidated Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628; *Mayor, etc., of New York v. New York & Staten Island Ferry Co.*, 64 N. Y. 624; *U. S. v. Memphis & L. R. R. Co.* (C. C.) 6 Fed. 237; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280.

CHAPTER VIII.

THE CORPORATION AND THE STATE.

- 73-74. Power of the State over Corporations—Charter as a Contract.
 75. Police Power of the State.
 76. Power of Eminent Domain.
 77. Reservation of Power to Repeal or Amend Charter.
 78. Offer of Amendment—Power of Majority.
 79-81. Taxation of Corporations.

POWER OF THE STATE OVER CORPORATIONS—CHARTER AS A CONTRACT.

73. The charter of a private corporation involves a contractual obligation within the meaning of the constitutional declaration that no state shall pass any law impairing the obligation of contracts, and it cannot be impaired by repeal or amendment contrary to its terms.
- (a) There is a contract between the corporation and the state which cannot be so impaired.
 - (b) There is also a contract between the incorporators and the corporation, which cannot be impaired.
 - (c) But repeal or amendment of a charter is not unconstitutional as impairing the obligation of contracts between the corporation and third persons.
74. The constitutional provision referred to does not prevent legislation affecting the charter of a corporation under the following circumstances:
- (a) It does not prevent the state from passing laws in the valid exercise of its police power.
 - (b) It does not prevent the state from taking the property and franchises of a corporation for public use, under the power of eminent domain, if due compensation is made.
 - (c) It does not prevent the repeal, alteration, or amendment of a charter, if the power to repeal, alter, or amend was reserved by the state in granting the charter.

Theoretically, the British parliament, with respect to its power to enact laws, is omnipotent. There is no written constitution imposing restraints upon it. And, among other unlimited powers, it has the power to repeal or alter charters of corporations, as it may see fit. The power is not often exercised, it is true, but it exists, and at certain periods of English history it has been arbitrarily exercised. Parliament, if it should choose, could grant a charter, and then, after the incorporators have invested their money in the enterprise, repeal it, however great the loss might be. In this country the power of the legislature is not supreme, but is restricted in very many respects by

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 constitutional provisions. In the constitution of the United States it is declared that "no state shall pass any law impairing the obligation of contracts."¹ And it is now settled beyond any controversy that the charter of a private corporation is a contract, within the meaning of the constitution.² In the Dartmouth College Case,³ a charter had been granted by the king of England to the trustees of Dartmouth College, a charity founded by private persons. Nearly forty years afterwards the legislature of New Hampshire undertook to alter this charter in material respects. The New Hampshire court sustained the act, but the decision was reversed by the supreme court of the United States, on the ground that the charter was a contract within the meaning of the constitution, and that the acts in question, in materially altering it, without the consent of the corporation, impaired its obligation, and were void.

The constitutional prohibition against acts impairing the obligation of contracts applies only in the case of private corporations. The charters of public corporations may be repealed or amended by the legislature at pleasure. As we have seen, however, colleges, hospitals, asylums, and other charitable institutions, founded by private means, are private corporations, and within the protection of the constitution, though they may have been founded for the benefit of the public.⁴

If the legislature, without having reserved the right to do so, repeals the charter of a corporation outright, there can be no question but that the repeal is unconstitutional and void. Difficult questions, however, arise where the charter is not repealed, but merely altered or amended. The rule in such cases is that, if the legislature alters the charter of a corporation in any material respect, it impairs the obligation thereof, unless the alteration or amendment is authorized under the rules hereafter shown. In the Dartmouth College Case,⁵

¹ Const. U. S. art. 1, § 10.

² Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, 1 Cumming, Cas. Priv. Corp. 490, W. D. Smith, Cas. Corp. 148, Shep. Cas. Corp. 248; Hazen v. Bank, 1 Sneed (Tenn.) 115; Zimmer v. State, 30 Ark. 677; Downing v. Board, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; Ruggles v. People, 91 Ill. 256; Illinois Cent. R. Co. v. People, 95 Ill. 313; State v. Greer, 78 Mo. 188; Hamilton v. Keith, 5 Bush (Ky.) 458; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; and cases hereafter cited and referred to. For adverse views, see Mechanics' & Traders' Branch of State Bank v. Debolt, 1 Ohio St. 591; Bank of Toledo v. City of Toledo, 1 Ohio St. 622; Skelly v. Bank, 9 Ohio St. 606; Dow v. Northern R. Co., 67 N. H. 1, 36 Atl. 510; 6 Harv. L. R. 161, 213; 8 Harv. L. R. 295.

³ Supra.

⁴ Dartmouth College v. Woodward, supra; Downing v. Board, supra; Cary Library v. Bliss, supra; ante, p. 25.

⁵ Supra.

above referred to, the charter of the corporation vested the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, in the trustees appointed by the charter, and the charter expressly stipulated that the corporation, thus constituted, should continue forever, and that the number of trustees should forever consist of twelve, and no more. The acts of the legislature of New Hampshire increased the number of trustees to twenty-one, gave the appointment of the additional members to the executive of the state, and created a board of overseers, to consist of twenty-five persons, of whom twenty-one were to be appointed by the executive of the state, with the power to inspect and control the acts of the trustees. It was held that this was a material alteration of the charter, and that the acts therefore were void.⁶

Alteration of a charter, where the power has not been reserved, is unconstitutional if it impairs the contracts between the corporation and the stockholders or members. Thus, where the charter of a corporation is not subject to alteration, amendment, or repeal, the legislature cannot change or interfere with the mode of voting at corporate meetings, as by allowing cumulative voting, etc.⁷ Nor can it authorize a majority of the stockholders or members to accept amendments of the charter, or to engage in enterprises not authorized by the charter, without the consent of the minority,⁸ or to consolidate with another corporation, and transfer the corporate property to it.⁹ Nor can a charter be altered by requiring a less amount of capital stock, so as to make previous subscribers liable as shareholders before the amount of stock required at the time of their subscription is

⁶ See, also, *Downing v. Board*, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; *Central Trust Co. v. Citizens' Street Ry. Co. (C. C.)* 82 Fed. 1; *Ball v. Rutland Ry. Co. (C. C.)* 93 Fed. 513. In *Zimmer v. State*, 30 Ark. 677, by the terms of an irrepealable charter, the corporation was authorized to form a union or consolidate with another corporation; and its officers, agents, and servants were exempted from military and road duty, and from jury service. It was held that it could not be deprived of any of these privileges and exemptions by subsequent legislation.

⁷ *State v. Greer*, 78 Mo. 188; *Hays v. Com.*, 82 Pa. 518. See, also, *In re Election of Directors of Newark Library Ass'n*, 64 N. J. Law, 217, 43 Atl. 435; *Tucker v. Russell (C. C.)* 82 Fed. 263. Compare *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

⁸ *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, 1 Cumming, Cas. Priv. Corp. 781; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517; *Black v. Canal Co.*, 24 N. J. Eq. 455.

⁹ *Lauman v. Railroad Co.*, 30 Pa. 46, 72 Am. Dec. 685.

subscribed.¹⁰ Such alterations and amendments as these are unconstitutional, not as impairing the implied contract between the corporation and the state, but as impairing the contract between the corporation and the dissenting members by compelling them to embark in an enterprise different from that agreed upon.*

As we have seen in a former chapter, it is a settled rule for the construction of charters that in case of ambiguity and doubt they are to be construed most strictly in favor of the public and against the corporation. And this rule is important in connection with the subject now under discussion.¹¹

The state, in granting a charter to a private corporation, does not impliedly stipulate that it will not afterwards create a similar corporation to compete with the former, or pass any other valid law, which will have the effect of rendering the first charter valueless. So long as it does not impair the obligation of its contract with the first corporation, as embodied in the charter, it may pass any valid law it may see fit, though the effect of such law may be to render the charter practically worthless. In *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*,¹² the state of Massachusetts had chartered the plaintiff to build a bridge across the Charles river, and to take tolls for the use thereof. After the bridge had been built and maintained for a number of years, the state chartered the defendant corporation, and authorized it to build another bridge over the Charles river in close proximity to the plaintiff's bridge, and under the defendant's charter its bridge in the course of a few years became the property of the state, and a free bridge. It was held that the defendant's charter was valid, though its effect was to indirectly destroy the value of the plaintiff's charter, franchises, and property, since the state did not expressly bind itself not to authorize another bridge, and no such stipulation could be implied. And so the state may charter a railroad or turnpike company to run its road along the

¹⁰ *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571. See, also, *Evans v. Nellis* (C. C.) 101 Fed. 920.

* *Ireland v. Palestine Turnpike Co.*, 19 Ohio St. 369; *Bedford v. Eastern Building & L. Ass'n.*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834. A mutual insurance company cannot transform itself into a joint-stock company against the will of a member who became such before passage of an amendment granting such power. *Schwarzwaelder v. German Mut. Fire Ins. Co.*, 59 N. J. Eq. 589, 44 Atl. 769.

¹¹ See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. (N. S.) 420, 9 L. Ed. 773, 938, 1 Cumming, Cas. Priv. Corp. 506; ante, p. 116.

¹² 11 Pet. 420, 1 Cumming, Cas. Priv. Corp. 506. And see *In re Opening of Hamilton Avenue*, 14 Barb. (N. Y.) 405; *Skaneateles Waterworks Co. v. Village of Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687.

same route as a previously chartered railroad, turnpike, or canal company, provided no exclusive privileges have been in terms granted to the prior corporation.¹³

In the absence of constitutional limitations, however, the legislature may grant an exclusive privilege to a private corporation,¹⁴ and, if it does so in its charter, the grant constitutes a contract in the sense of the federal constitution, and cannot be impaired by subsequent legislation.¹⁵ Thus where a state created a corporation to construct a bridge, and the charter expressly stipulated that no other bridge should be built within a certain distance of it, a subsequent charter authorizing another corporation to construct a bridge within the prohibited distance was held unconstitutional.¹⁶ The same rule applies where the legislature charters a gas, or water, or electric lighting company, and grants it an exclusive privilege of supplying a city and its inhabitants with light or water.¹⁷ In some states the constitution now restricts the power of the legislature to grant exclusive privileges.¹⁸

The repeal of a charter or dissolution of a corporation under statutory authority is not a violation of the federal constitution as impairing the obligation of contracts made by the company with third persons.¹⁹ Two reasons for so holding were given by the supreme court of the United States in *Mumma v. Potomac Co.*²⁰ In the first place, the obligation of the contracts of the company survives the dissolution, and the creditors may enforce their claims against any property belonging to the company which has not passed into the hands of bona fide purchasers, but is still held in trust for the company, or for the stockholders, at the time of its dissolution in any mode permitted by the local laws. In the second place, it was said,

¹³ *White River Turnpike Co. v. Vermont Cent. R. Co.*, 21 Vt. 590; *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374; *Washington & B. Turnpike Co. v. Baltimore & O. R. Co.*, 10 Gill & J. (Md.) 392.

¹⁴ Ante, p. 31.

¹⁵ *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516.

¹⁶ *The Binghamton Bridge*, 3 Wall. (U. S.) 51, 18 L. Ed. 137.

¹⁷ *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, supra; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525.

¹⁸ See ante, p. 31.

¹⁹ *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. Ed. 945, 1 Cumming, Cas. Priv. Corp. 459; *Thornton v. Railway Co.*, 123 Mass. 32, 1 Cumming, Cas. Priv. Corp. 462; *Read v. Frankfort Bank*, 23 Me. 318.

²⁰ *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. Ed. 945, 1 Cumming, Cas. Priv. Corp. 459.

"independently of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it perpetuity of existence contrary to public policy, and the nature and objects of its charter."

"There is a distinction between the obligation of a contract and the remedy for its enforcement. Whatever pertains merely to the remedy may be changed or modified, at the discretion of the legislature, without impairing the obligation of the contract, provided the remedy be not wholly taken away, nor so hampered or reduced in effectiveness as to render the contract practically incapable of enforcement."²¹ This principle applies to laws affecting existing corporations, the charters of which are not subject to alteration, amendment, or repeal by the legislature. Thus a statute which prescribes a mode of service of judicial process upon a corporation, different from that provided for in its charter, or which otherwise authorizes new remedies, is not void as impairing the obligation of a contract.²²

POLICE POWER OF THE STATE.

75. There is nothing in the federal or state constitutions depriving the legislatures of the power to pass any laws, in the exercise of the police power of the state, which may be necessary or proper for the protection of the public safety, health, comfort, morals, or the property of the citizens; and such laws are valid, though they may detract from the powers of existing corporations, or impose burdens upon them. The legislature cannot divest itself of this power.

In this country the legislatures of the different states have the same unlimited power in regard to legislation as the British parliament, except in so far as they may be restrained by the state or federal constitution. They can pass any law affecting existing corpora-

²¹ Black, Const. Law, 538.

²² *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168, 24 L. Ed. 423. See, also, *Carey v. Giles*, 9 Ga. 253; *Chicago Life Ins. Co. v. Auditor of Public Accounts*, 101 Ill. 82; *Williamsport & H. Turnpike Co. v. Startzman*, 86 Md. 363, 38 Atl. 777; *Louisville & N. R. Co. v. Williams*, 103 Ky. 375, 45 S. W. 229; post, p. 500.

tions, however much it may increase their burdens or restrict their powers, provided no constitutional provision is violated.²³ The constitutional provision against laws impairing the obligation of contracts does not prevent the legislatures from regulating corporations, under the police power of the state, in the use of their franchises.²⁴ The constitution was not intended to deprive the legislatures of this power, and the legislatures could not divest themselves of it if they would. "Whatever differences of opinion," it has been said, "may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, 'Salus populi suprema lex;' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power."²⁵

It may be laid down as a general rule that the legislature may control the action of corporations, prescribe their functions and duties, and impose restraints upon them, to the same extent as upon natural persons, in all matters coming within the general range of legislative authority; subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken away without compensation.²⁶ Nothing is better settled than that, under its police power, a state may subject persons to restraints and burdens in order to secure the general comfort, health, and prosperity of the people at large; and this power extends to corporations as well as to natural persons. Thus, if the state creates a corporation and authorizes it to erect a powder mill, or to maintain a burying ground,

²³ *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625, 1 Cumming, Cas. Priv. Corp. 521.

²⁴ *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625, 1 Cumming, Cas. Priv. Corp. 521; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, 1 Cumming, Cas. Priv. Corp. 533; *Answer of the Justices*, 9 Cush. (Mass.) 604; *Galena & C. U. R. Co. v. Loomis*, 18 Ill. 548, 56 Am. Dec. 471; *Chicago Life Ins. Co. v. Needles*, 118 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; *Eagle Ins. Co. of Cincinnati v. State of Ohio*, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778.

²⁵ *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, 1 Cumming, Cas. Priv. Corp. 533. And see *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71.

²⁶ *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625, 1 Cumming, Cas. Priv. Corp. 521; *Ward v. Farwell*, 97 Ill. 593.

or a slaughterhouse, fertilizer manufactory, or tannery at a certain place, at a time when the place is remote from inhabitants, it may afterwards require the business to be suspended or removed, or secured from doing harm, at the sole expense of the corporation, if in process of time dwellings approach the locality, so as to render the further pursuit or maintenance of the business at that place destructive to the health or comfort of others.²⁷

In *Boston Beer Co. v. Massachusetts*²⁸ a corporation had been chartered to manufacture and sell malt liquors. Afterwards the legislature passed a prohibitory liquor law, and it was contended by the corporation that this law, if applicable to it, was void, as being an impairment of its contract with the state. The court held the law valid as to the corporation, on the ground that, though it was given by its charter the right to manufacture and sell malt liquors, the charter could not be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. "If the public safety or the public morals," it was said, "require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state." Other illustrations are given below.²⁹

²⁷ *Thorpe v. Railroad Co.*, supra; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Coates v. Mayor, etc., of New York*, 7 Cow. (N. Y.) 585; *Brick Presbyterian Church v. Mayor, etc., of New York*, 5 Cow. (N. Y.) 538; *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71.

²⁸ *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, 1 Cumming, Cas. Priv. Corp. 533.

²⁹ The state cannot prohibit existing railroad companies from carrying unobjectionable freight and passengers; but it may regulate them in the conduct of their business, so as to secure the safety of persons and property. It is perfectly competent, therefore, for the legislature to prohibit them from carrying persons or live stock infected with contagious diseases, or to require them to stop at crossings, to maintain switchmen and watchmen, to provide a certain number of brakemen, to use proper rails and maintain a proper track, or to maintain fences and cattle guards along their road; and it may require them to bear the expense of such safeguards. *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625, 1 Cumming, Cas. Priv. Corp. 521; *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555, 1 Cumming, Cas. Priv. Corp. 546; *Nelson v. Railroad Co.*, 28 Vt. 717, 62 Am. Dec. 614; *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Horn v. Railway Co.*, 38 Wis. 463; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Hegeman v. Railroad Corp.*, 16 Barb. (N. Y.) 353; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948. It may make railroad companies liable for property destroyed by fire from locomotives. *St. Louis & S. F. Ry.*

In the exercise of the police power the state cannot, in the case of a corporation, any more than in the case of a natural person, pass any law taking or destroying property which is actually in existence, and in which the right of the owner has become vested, even though the law may be for the public good, unless it makes due compensation therefor. Thus, if the state were to charter a corporation unqualifiedly for the purpose of manufacturing and selling malt liquors, it could

Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; Atchison, T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. And it may require a railroad company to stop at county seats to take on and let off passengers. Chicago & A. R. Co. v. People, 105 Ill. 657; Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. And it may require a railroad company, at its own expense, to construct a bridge over a highway, even though it may not have reserved the power to amend or repeal its charter. People v. Boston & A. R. Co., 70 N. Y. 569; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948. And it may prohibit railroad companies from crossing each others' tracks at grade. Pittsburg & C. R. Co. v. Southwest P. Ry. Co., 77 Pa. 173. So a city ordinance may prohibit existing railroad companies from running steam engines on a certain street. Railroad Co. v. Richmond, 96 U. S. 521, 24 L. Ed. 734. The state, having chartered a bank with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, could not afterwards make it unlawful for the bank to transfer by indorsement or otherwise any bill or note, etc., for this would be a violation of the charter, and not at all necessary as a police measure. Jemison v. Bank, 23 Ala. 168. But the state may bind existing savings banks, or other banks, by general laws relating to investments of deposits. Answer of the Justices to Inquiry of the Senate, 9 Cush. (Mass.) 604. And it has been held that it may pass a law making stockholders of existing corporations liable for the future debts of the corporation. Child v. Coffin, 17 Mass. 64; Gray v. Coffin, 9 Cush. (Mass.) 192; Stanley v. Stanley, 26 Me. 191. And it may reduce the rate of interest, or prohibit speculations in exchange, or depreciated paper, or the issuing of bills of a given denomination, etc. See Thorpe v. Railroad Co., 27 Vt. 140, 62 Am. Dec. 625, 1 Cumming, Cas. Priv. Corp. 521. The state has the same power to tax corporations as it has to tax individuals, provided it has not expressly surrendered the right in granting the charter, though the power clearly abridges the beneficial use of the franchise, and is capable of being so exercised as virtually to destroy it. Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939; post, p. 219. The right to have migratory fish pass in their accustomed course up and down rivers and streams is a public right, and may be regulated and protected by the legislature in such a manner as it may deem appropriate; and every grant of a right to maintain a mill dam across a stream where such fish are accustomed to pass is subject to the implied condition or limitation that a sufficient and reasonable way shall be allowed for the fish, unless cut off by express provision or obvious implication in the grant. Commissioners on Inland Fisheries v. Holyoke Water-Power Co., 104 Mass. 446, 6 Am. Rep. 247; Com. v. Essex Co., 13 Gray (Mass.) 239, 1 Cumming, Cas. Priv. Corp. 550. The state may pass a law requiring existing corporations, like insurance companies, banks, etc., having extensive dealings with the public, to make periodical statements of their condition, and providing for

not afterwards pass a liquor law prohibiting the sale of liquors already manufactured by the corporation without making due compensation therefor, though it could prohibit further manufacture.⁸⁰

So, the right of members to vote at corporate meetings for directors, and on other corporate matters, is a property right, and, if the mode of voting is prescribed by an irrepealable charter, it is protected by the constitutional prohibition against laws impairing the obligation of contracts, so that the state cannot interfere with it either by constitutional or legislative enactment. A law regulating the mode of voting at corporate elections cannot be called a police regulation.⁸¹

compulsory liquidation of their business in case of insolvency; or make other provisions of this nature for the protection of the public. Such laws are valid police regulations. *Attorney General v. North America Life Ins. Co.*, 82 N. Y. 172; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778; *Ward v. Farwell*, 97 Ill. 593; *Chicago Life Ins. Co. v. Auditor of Public Accounts*, 101 Ill. 82; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 955; *Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56. Railroad companies may be made liable to laborers employed by contractors in constructing their roads. *Branin v. Railroad Co.*, 31 Vt. 214. And a state may regulate the charges of railroad and warehouse companies, and other corporations engaged in a public employment affecting the public interest. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. R. Co. v. People*, 95 Ill. 313. But the regulation must be reasonable. *Stone v. Trust Co.*, *supra*; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. An act requiring railroad companies to keep for sale 1,000-mile tickets at specified rates less than the regular rates, to be used in the name of the purchaser, his wife and children, and valid for two years, where the maximum passenger rates had previously been established by the legislature, was void, as not within the power to fix maximum rates, nor a proper regulation of the affairs of the company, but a taking of its property without due process of law. *Lake Shore & M. S. Ry. Co. v. Smith*, 178 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, reversing 114 Mich. 460, 72 N. W. 328.

⁸⁰ *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, 1 Cumming, Cas. Priv. Corp. 533. And see *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 12 L. Ed. 447; *State v. Lebanon & W. Turnpike Co.* (Tenn. Ch. App.) 61 S. W. 1096.

⁸¹ *State v. Greer*, 78 Mo. 188.

POWER OF EMINENT DOMAIN.

76. The property of a corporation, including its franchises, may, like the property of an individual, be taken for public use under the power of eminent domain, on making due compensation therefor.

The power of the state to take private property for public use under the power of eminent domain, on making compensation to the owner, extends to the property and franchises of a corporation, as well as the property of individuals. "The property of corporations, including their franchises, may be taken for public use under the power of eminent domain, on making due compensation."³² Thus, where the legislature, under a reserved power, repealed the charter of a railroad company operating a railroad through the streets of a city, it was held that in chartering another corporation it had the power to authorize it to take the property of the old corporation, on making due compensation therefor.³³

Laws which take or authorize the taking of corporate property and franchises for public use under the power of eminent domain, which cannot legally be done without making compensation, must be distinguished from laws regulating corporations in the use of their franchises and property, enacted either under the police power of the state, or under a power to alter or amend the charter reserved by the state in granting it. Police regulations, as we have seen, may impose burdens and expenses upon corporations for the public good, but this does not form ground for objection by the corporation.³⁴

³² *Greenwood v. Freight Co.*, 105 U. S. 13, 28 L. Ed. 961, 1 Cumming, Cas. Priv. Corp. 538, W. D. Smith, Cas. Corp. 160, Shep. Cas. Corp. 260. And see *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 12 L. Ed. 535; *Eastern R. Co. v. Boston & M. R. R.*, 111 Mass. 125, 15 Am. Rep. 18; *White River Turnpike Co. v. Vermont Cent. R. Co.*, 21 Vt. 590; *Boston Water-Power Co. v. Boston & W. R. Corp.*, 23 Pick. (Mass.) 360; *Central Bridge Corp. v. City of Lowell*, 4 Gray (Mass.) 474; *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374; *Black v. Canal Co.*, 24 N. J. Eq. 455; *Board of Trustees of Illinois & M. Canal v. Chicago & R. I. R. Co.*, 14 Ill. 314.

³³ *Greenwood v. Freight Co.*, *supra*.

³⁴ *Ante*, p. 206. See *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; 1 Cumming, Cas. Priv. Corp. 546.

RESERVATION OF POWER TO REPEAL OR AMEND CHARTER.

77. The state may, and generally does, reserve the power to repeal, alter, or amend charters by a provision to that effect either in the charter itself, or act of incorporation, or in some general law, or in the constitution. This reservation, however, gives no right to impair or take away vested rights.

The state may always, in granting a charter, incorporate such terms and conditions as it may see fit. Therefore it may reserve the power to alter, amend, or repeal the charter. And it may do so either by incorporating such a condition in the charter itself, or by a general law in force at the time the charter is granted, or by a provision contained in the state constitution. In the two latter cases no reference need necessarily be made in the charter to the general law or constitutional provision. If it is applicable, it becomes a part of the charter, and a term of the contract between the state and the corporators.⁸⁵

Where a general law provides, as in many states, that charters shall be subject to amendment, alteration, or repeal, "at the pleasure of the legislature," the reason of a repeal or amendment and the motive of the legislature are immaterial. "The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it."⁸⁶

As shown in a previous chapter, an amendment, like the original charter, must be accepted, to have any effect. Though the legislature may have reserved the power to alter, amend, or repeal a charter of a private corporation, and though, under this reservation of power, it can repeal the charter without regard to the consent or nonconsent of the corporation, and may impose an amendment as a condition of the corporation's continuing to exercise its franchises, it cannot,

⁸⁵ *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961, 1 Cumming, Cas. Priv. Corp. 538, W. D. Smith, Cas. Corp. 160, Shep. Cas. Corp. 260; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, 1 Cumming, Cas. Corp. 533; *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555, 1 Cumming, Cas. Priv. Corp. 546; *Parker v. Railroad Co.*, 109 Mass. 506; *Miller v. State*, 15 Wall. (U. S.) 478, 21 L. Ed. 98; *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778; *Story v. Plank-Road Co.*, 16 N. J. Eq. 13, 84 Am. Dec. 134; *State v. Commissioner of Railroad Taxation*, 37 N. J. Law, 228; *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.* (Del. Ch.) 46 Atl. 12. Where the power is reserved by a general law, a charter thus subjected thereto is not affected by a subsequent repeal of the law. *Watson Seminary v. Pike County Court*, 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675.

⁸⁶ *Greenwood v. Freight Co.*, supra; *Com. v. Eastern R. Co.*, supra. And see *Lothrop v. Stedman*, 42 Conn. 584, Fed. Cas. No. 8,519.

without its consent, compel it to continue under the charter as amended. The amendment must be accepted, or it has no binding force. As was said by the Massachusetts court, "that a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities."³⁷ Of course, a corporation cannot conduct its operations in defiance of the state; and, if it does not accept an authorized amendment of its charter, it must discontinue its operations as a corporate body.³⁸ And, as we have seen, if a corporation continues to act as such after an authorized amendment, it may be regarded as having accepted the amendment.³⁹

The state, under a reservation of power to repeal, alter, or amend a charter, may exercise such power, and to almost any extent, to carry into effect the original purposes of the grant, and to protect the rights of the public and the corporators, or to promote the due administration of the affairs of the corporation; but it cannot impair or destroy vested rights under such a reservation of power.⁴⁰ In a case in which the

³⁷ *Ellis v. Marshall*, 2 Mass. 279, 3 Am. Dec. 49. See *Yeaton v. Bank*, 21 Grat. (Va.) 593. In this case it is said: "Every amendment or modification of a charter of incorporation is nothing more than a new contract, which is not binding upon the corporate body until accepted by them." See ante, p. 47, and cases there cited.

³⁸ *Yeaton v. Bank*, supra.

³⁹ Ante, p. 47, and cases there cited.

⁴⁰ See dissenting opinions of Strong, Bradley, and Field, JJ., in the *Sinking-Fund Cases*, 99 U. S. 700, 727, 25 L. Ed. 496. And see *Sage v. Dillard*, 15 B. Mon. (Ky.) 340. An act declaring that all charters and grants of or to corporations or amendments thereof, shall be subject to amendment or repeal, applies to extensions of pre-existing charters. *Deposit Bank v. Davies County*, 102 Ky. 174, 39 S. W. 1030, 44 L. R. A. 825; *Northern Bank of Kentucky v. Stone*, 88 Fed. 413. The legislature cannot impair the right to redeem from a mortgage. *Ashuelot R. Co. v. Elliot*, 58 N. H. 451. Nor can it prevent distribution of the assets of a corporation, whose charter it has repealed, among those who are entitled to them. *Lothrop v. Stedman*, 42 Conn. 584, Fed. Cas. No. 8,519. "The reserved right to repeal, alter, or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice, by depriving of the equal protection of the laws or the constitutional guaranties against the taking of property without due process of law." Per White, J., in *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162. See, also, *Louisville Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 55; *St Louis & I. M. Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; *Lake Shore & M. C. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79. A general power, given a railroad by its charter, to consolidate with, purchase, lease, or acquire the stock of other roads, may, while it remains unexecuted, be limited by the legislature, under the reserved power to amend the charter without impairing any vested rights, to cases where the other roads are not parallel

legislature prescribed the rate of fare to be charged by an existing railroad company, whose charter was subject to alteration, amendment, or repeal, Mr. Justice Swayne said: "It is urged that the franchise here in question was properly held by a vested right, and that its sanctity as such could not be thus invaded. The answer is, 'Consensus facit jus.' It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the general assembly. There is, therefore, no ground for just complaint against the state. Where an act of incorporation is repealed, few questions of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of creditors. If anything is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."⁴¹ The court then

or competing. *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. In *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849, the same result was reached, where there was no reserved power to amend the charter; the decision resting upon the police power.

⁴¹ *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357. In another case it was said: "A power reserved to the legislature to alter, amend, or repeal a charter, authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close v. Glenwood Cemetery*, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. Ed. 408. And see *State v. Neff*, 52 Ohio St. 375, 40 N. E. 720, 28 L. R. A. 409; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; *Dow v. Northern R. Co.*, 67 N. H. 1, 36 Atl. 510; *Rochester & C. Turnpike Road Co. v. Joel*, 41 App. Div. 43, 58 N. Y. Supp. 346; *United States v. Union P. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; *Stanislaus County v. San Joaquin & K. R. C. & I. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406. An act providing that, whenever any railroad corporation shall receive or ship live stock by the car load, it shall, in consideration of the usual price paid for the shipment of such car, pass the shipper without further expense in the way of fare, is not a legitimate exercise of the reserved power, being a deprivation of property without due process of law, and a denial of the equal protection of the laws. *Atchison, T. & S. F. Ry. Co. v. Campbell*, 61 Kan. 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. Rep. 328.

held that the regulation in question did not take away a vested right, but was a legitimate exercise of the reserved power of alteration.

A corporation authorized to construct a dam across a river or stream may be afterwards required to construct and maintain fishways to permit the passage of migratory fish.⁴² But where such a corporation had built a fishway in its dam, as required by statute, and had afterwards been granted an enlargement of its charter, upon the consideration that it should pay the damage caused to the owners of fishing rights by the dam as already built, with a fishway known to the legislature to be insufficient, and the corporation paid such damages, it was held that the right to maintain the dam as it was, with the insufficient fishway, had been paid for, and was vested in the corporation, and that this vested right could not be taken from it by a subsequent act requiring it to construct sufficient fishways at great cost, though the legislature had reserved the right to alter, amend, or repeal the charter.⁴³

So, where a corporation had built a plank road, and established a toll gate, as authorized by its charter, it was held that the reserved power to amend, alter, or repeal its charter did not give the legislature the right to require it to move the toll gate beyond the limits of a city which had grown up around it, and so to take from the company the right to collect tolls upon more than two miles of its road. "A statute which could have this effect," said Judge Cooley, "would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation."⁴⁴

The power to alter, amend, or repeal a charter does not give the

⁴² *Com. v. Essex Co.*, 18 Gray (Mass.) 239, 1 Cumming, Cas. Priv. Corp. 550; *Commissioners on Inland Fisheries v. Holyoke Water-Power Co.*, 104 Mass. 446, 6 Am. Rep. 247.

⁴³ *Com. v. Essex Co.*, *supra*. The court said in this case: "No amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damaged by the defendant's dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all persons damaged in their several fisheries, and the defendant company had executed their part of the contract by the payment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and therefore that the said act was null and void." See, also, *Woodward v. Central Vermont Ry. Co.*, 180 Mass. 599, 62 N. E. 1051.

⁴⁴ *City of Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140, 5 N. W. 275, 1 Cumming, Cas. Priv. Corp. 560.

legislature the power to change the charter, and force a new and different charter upon the corporators. As was said in a New Jersey case: "It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind wholly or chiefly new, substituted for another, is not an alteration; it is a change."⁴⁵

Under the reservation of power to amend, alter, or repeal charters, it has been held that the legislature may make the stockholders of a corporation individually liable for its future debts;⁴⁶ that it may vary the measure, and thus enlarge the proportion, of the profits which a mutual life insurance company is required by the terms of its charter to pay a charitable institution;⁴⁷ that railroad companies may be compelled to make changes in the level, grade, and surface of the roadbed, new structures at crossings of other railroads or of highways, or station houses at particular places, in a manner and to be enforced by forms of process different from those provided for or contemplated by the original charter, or the general laws in force when the original charter was granted;⁴⁸ or that it may require a corporation authorized to build and maintain a dam across a navigable river to construct a lock

⁴⁵ *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, 1 Cumming, Cas. Priv. Corp. 781, 790.

⁴⁶ *Sherman v. Smith*, 1 Black, 587, 17 L. Ed. 163; *In re Lee & Co.'s Bank*, 21 N. Y. 9; *Bailey v. Hollister*, 26 N. Y. 112; *Gardner v. Insurance Co.*, 9 R. I. 194, 11 Am. Rep. 238; *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706. In some states this is a legitimate exercise of the police power of the state. Ante, p. 208, note 29.

⁴⁷ *Massachusetts General Hospital v. State Mut. Life Assur. Co.*, 4 Gray (Mass.) 227.

⁴⁸ *City of Roxbury v. Boston & P. R. Co.*, 6 Cush. (Mass.) 424; *Fitchburg R. Co. v. Grand Junction R. & D. Co.*, 4 Allen (Mass.) 198; *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555, 1 Cumming, Cas. Priv. Corp. 546; *Albany N. R. Co. v. Brownell*, 24 N. Y. 345 (overruling *Miller v. Railroad Co.*, 21 Barb. [N. Y.] 513). In *Mayor, etc. of Worcester v. Norwich & W. R. Co.*, 109 Mass. 103, the legislature had passed an act requiring certain railroad companies to unite in a passenger station in the city of Worcester, to extend their tracks in the city to the union station, and after the extension to discontinue parts of their existing locations. The act was held to be constitutional and valid, as it was a reasonable exercise of the reserved right to amend, alter, or repeal the charters of the corporations.

for purposes of navigation;⁴⁹ or require a corporation authorized to maintain a dam to maintain suitable fishways;⁵⁰ or revoke an exemption from taxation, or increase a tax or license fee;⁵¹ or require a corporation to establish a sinking fund to meet its obligations;⁵² or authorize a city to subscribe for stock, and to appoint two directors;⁵³ or, according to some of the decisions, but not all, authorize cumulative voting at stockholders' meetings at an election of directors;⁵⁴ or increase the number of trustees of an incorporated college, in which the state is part owner, and require a majority of them to consist of certain state officers, instead of being elected, as formerly, by the private stockholders;⁵⁵ or regulate the charges of railroad companies, water companies, and other quasi public corporations;⁵⁶ or require employés to be paid in full when discharged.*

⁴⁹ *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

⁵⁰ *Commissioners on Inland Fisheries v. Holyoke Water-Power Co.*, 104 Mass. 446, 6 Am. Rep. 247.

⁵¹ *Post*, p. 227.

⁵² *Union Pac. R. Co. v. U. S.*, 99 U. S. 700, 25 L. Ed. 496.

⁵³ *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

⁵⁴ *Cross v. Railway Co.*, 35 W. Va. 174, 12 S. E. 1071; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, affirming 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947. Under the reserved power the state can alter the provisions of a charter defining the internal scheme of organization of the corporation, and may authorize the issue of preferred stock by the consent of the holders of two-thirds of the capital stock, although the corporation was organized under a general law which authorized the issue of preferred stock by the unanimous consent of the shareholders. *Hinckley v. Schwarzschild & S. Co.*, 97 App. Div. 470, 95 N. Y. S. 357. But see *Orr v. Bracken Co.*, 81 Ky. 593; *Hays v. Com.*, 82 Pa. 518.

⁵⁵ *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778. And see *McKee v. Chautauqua Assembly (C. C.)* 124 Fed. 808. Contra, in a corporation in which shareholders are vested with the right of private property in their shares. In re *Election of Directors of Newark Library Ass'n*, 64 N. J. Law, 217, 43 Atl. 435; *Lord v. Equitable Life Assur. Soc.*, 47 Misc. Rep. 187, 94 N. Y. Supp. 65, 96 N. Y. Supp. 10.

⁵⁶ *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Parker v. Railroad Co.*, 109 Mass. 506; *Stanislaus County v. San Joaquin & K. R. O. & J. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406. Cf. *Pingree v. Michigan Cent. R. Co.*, 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274; *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. An act empowering cities to fix reasonable rates for the supply of water by any corporation does not impair the obligation of a contract, in the form of an ordinance by which a city granted a franchise to a corporation and fixed the water rentals during the period of the franchise, where the corporation was organized under a law providing that the legislature might prescribe such regulations as it deemed advisable. *Freeport Water Co. v. City of Freeport*, 186 Ill. 179, 57 N. E. 862; *City of Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304; *Id.*, 180 Ill. 235, 54 N. E. 224.

* *Leep v. St. Louis, I. M. & S. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R.

A reserved power of amending or repealing the charter of a corporation is a legislative power, and cannot authorize the legislature to exercise judicial powers. This would be unconstitutional. For instance, it cannot authorize the legislature to foreclose a mortgage on the corporate property.⁵⁷ It may, however, appoint a receiver or trustee to settle the affairs of an insolvent corporation. This is a legislative act.⁵⁸ It is also perfectly competent for the legislature to reserve to itself the right to repeal a charter for a violation thereof or other default. Such a reservation is not a reservation of judicial power, and for that reason unconstitutional, for an inquiry by the legislature into the affairs or defaults of a corporation, with a view to discontinue it, is not a judicial act.⁵⁹

It has been held by some of the courts that, where the legislature reserves the power at any time to annul and vacate the charter of a corporation, if it shall fail to go into operation, or shall abuse or misuse its privileges, the legislature reserves the power of determining whether these contingencies have happened and a future legislature may repeal the charter without any judicial proceeding or prior notice.⁶⁰ But the weight of authority is against this view. Most of the courts have held that under such a reservation the investigation and determination of the question whether the occasion has arisen upon which the reserved power of the legislature may be exercised, is one of judicial, and not of legislative, cognizance, and that the power can be exercised only after a judicial investigation and determination, after notice to the corporation, and an opportunity to be heard.⁶¹ In some jurisdictions it is held that the legislature may exercise the power of repeal before a judicial investigation, and without notice, but that its action is subject to review by the courts.⁶²

Where a charter is offered before, but is not accepted until after,

A. 264, 41 Am. St. Rep. 109; *St. Louis, I. & M. S. Ry. Co. v. Paul*, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154, affirmed 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; *Skinner v. Garnett Gold-Min. Co. (C. C.)* 96 Fed. 735. *Of. Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 59 Pac. 305, 47 L. R. A. 838.

⁵⁷ *Ashuelot R. Co. v. Elliot*, 58 N. H. 451.

⁵⁸ *Lothrop v. Stedman*, 42 Conn. 584, Fed. Cas. No. 8,519; *Carey v. Giles*, 9 Ga. 253.

⁵⁹ *Crease v. Babcock*, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; *Lothrop v. Stedman*, 42 Conn. 584, Fed. Cas. No. 8,519.

⁶⁰ *Miners' Bank of Dubuque v. U. S.*, *Morris (Iowa)* 482, 43 Am. Dec. 115.

⁶¹ *Flint & Fentonville Plank-Road Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *State v. Noyes*, 47 Me. 189; *Chesapeake & Ohio Canal Co. v. Baltimore & O. R. Co.*, 4 Gill. & J. (Md.) 122; *Regents of University of Maryland v. Williams*, 9 Gill. & J. (Md.) 365, 31 Am. Dec. 72.

⁶² *Erie & N. E. Railroad v. Casey*, 26 Pa. 287.

the adoption of a constitutional provision, or enactment of a statute, making all charters subject to amendment, alteration, or repeal, the provision enters into and forms a part of the contract between the corporation and the state, as the contract is not made until the charter is accepted.⁶³

78. OFFER OF AMENDMENT—POWER OF MAJORITY.

We are dealing here only with the power of the state to alter or amend a charter without the consent of the members of the corporation. Of course, there is nothing to prevent the legislature from authorizing a corporation to engage in new enterprises, if all the members see fit to accept the amendment. It is like the case where both parties to a contract rescind it by mutual agreement, and substitute a new contract. The power of the majority of the members to bind a dissenting minority by accepting an amendment of the charter thus offered will be discussed in a subsequent chapter.⁶⁴

TAXATION OF CORPORATIONS.

79. Unless a corporation is expressly exempted from taxation by its charter, the state may tax it to the same extent as it may tax individuals, without impairing the contract implied between the state and the corporation. But the power to tax is not unlimited. Thus:

- (a) Taxes can be imposed only for a public purpose.
- (b) The taxing power is limited to persons, property, and business within the jurisdiction of the state.
- (c) Provisions of the state constitution must not be violated, as provisions requiring uniformity and equality of taxation.
- (d) In the absence of constitutional limitations, double taxation is not prohibited, but in a number of states it is prohibited by the constitution. Even when not prohibited, it is unjust, and in construing statutes all presumptions are against it.
- (e) Provisions of the federal constitution must not be violated, such as—
 - (1) The provision that no state shall deny to any person within its jurisdiction the equal protection of the laws. This prohibits unequal taxation.
 - (2) The provision that no state shall pass any law impairing the obligation of contracts. This prevents taxation of a corporation in violation of the express terms of its charter.
 - (3) As government bonds cannot be taxed, capital invested in them is exempt.

⁶³ Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425; Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102.

⁶⁴ Post, p. 434.

- (4) No tax can be imposed which will amount to a regulation of or interference with interstate commerce.
- (5) The states cannot interfere by taxation with the operation of corporations created by congress for the purpose of carrying into effect the constitutional powers of the federal government, except in so far as it may be permitted by congress.
80. By the weight of authority, a state, in creating a corporation, or afterwards for a consideration, but not otherwise, may agree that it shall be exempt from taxation, in whole or in part; and it cannot, in such a case, impose a tax in violation of the charter without impairing the obligation of its contract. But—
- (a) Exemption from taxation must be clearly shown. All presumptions are against it.
- (b) An exemption from taxation may be revoked if the state has reserved the power to repeal, alter, or amend the charter.
81. A corporation cannot escape liability for taxes on the plea of *ultra vires*.

Unless the case comes within one of the exceptions hereafter explained, a state has the same power to tax corporations as it has to tax natural persons, and no greater power than this. In the absence of express exemption from taxation, the imposition of a tax upon the property of a corporation is not a violation of its charter, and so within the constitutional prohibition against laws impairing the obligation of contracts, for exemption from taxation is not an implied term of the contract between the corporation and the state.⁶⁵

Object of Taxation.

The legislature can only use the power of taxation in aid of a public object, an object which is within the purpose for which governments are established. It cannot, therefore, be exercised in aid of private enterprises, even though the local public may be benefited in a remote or collateral way. Thus a tax cannot be imposed to aid a manufacturing enterprise of individuals.⁶⁶ This principle is not peculiar to the taxation of corporations. In *Lowell v. City of Boston*⁶⁷ it was held that a statute authorizing the city of Boston to issue bonds, which, of course, might require taxation to pay them, and to lend the proceeds on mortgage to the owners of land, the buildings upon which were burned by the great fire of 1872, was unconstitutional.

⁶⁵ *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939. As to the taxation of railroad companies, see *State Railroad Tax Cases*, 92 U. S. 575-618, 23 L. Ed. 663; *Indianapolis & St. L. R. Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. Ed. 888.

⁶⁶ *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238.

⁶⁷ *Lowell v. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39

Jurisdiction.

The power of taxation of a state is limited to persons, property, and business within her jurisdiction. All taxation must relate to one of these objects.⁶⁸ Bonds issued by a railroad company, for instance, are property in the hands of the holders, and, when held by non-residents of the state in which the company was incorporated, they cannot be taxed by the state, and it can make no difference that they are secured by a mortgage on land in the state.⁶⁹ A law, therefore, which requires a corporation to retain a certain percentage of the interest due on bonds made payable out of the state to citizens of another state, and held by them, is not a legitimate exercise of the taxing power.⁷⁰

Property Taxable.

The statutes generally provide very specifically what property of corporations shall be taxed, and how the taxes shall be assessed. But the construction of the statutes is not always clear. In corporations there are sometimes four elements of taxable value, namely: (1) The franchises of the corporation; (2) capital stock in the hands of the corporation; (3) corporate property, such as real estate, moneys, credits, and other personal property, other than such stock; and (4) shares of stock in the hands of the individual stockholders.* Any one of these may be taxed, provided no constitutional limitations, federal or state, are violated. And where the shares of stock in a corporation are taxed, the legislature may require that the tax shall be paid by the corporation, and allow it to collect the same from the stockholders, or deduct it from dividends,⁷¹ unless the corporation, by its charter, is exempt from taxation, so that this might be a tax upon it.⁷²

Double Taxation.

In many jurisdictions double taxation is prohibited by the constitution. In the absence of such prohibition, it is no doubt within the power of the legislature to assess taxes in such a way as to subject the corporation or the stockholders to double taxation.⁷³ But an in-

⁶⁸ Case of State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300, 21 L. Ed. 179; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; Com. v. Standard Oil Co., 101 Pa. 119; Com. v. Chesapeake & O. R. Co., 27 Grat. (Va.) 344.

⁶⁹ Case of State Tax on Foreign-Held Bonds, *supra*; South Nashville St. R. Co. v. Morrow, *supra*; Com. v. Chesapeake & O. R. Co., *supra*.

⁷⁰ Case of State Tax on Foreign-Held Bonds, *supra*.

* Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830.

⁷¹ Town of St. Albans v. National Car Co., 57 Vt. 68.

⁷² Post, p. 229, and note 112.

⁷³ See Board of Revenue of Montgomery Co. v. Montgomery Gaslight Co., 64 Ala. 269; Pittsburg, F. W. & C. R. Co. v. Com., 66 Pa. St. 77, 5 Am. Rep. 344.

tention to impose double taxes is never to be presumed. It is unjust, and therefore "all presumptions are against such an imposition."⁷⁴ Thus, where a charter exempted the stock of a corporation from taxation, but taxed its property, it was held that the exemption extended to shares of stock in the hands of the individual shareholders, the capital represented by which had been converted by the corporation into property which was liable to taxation.⁷⁵

A tax on the franchises of a corporation is not a tax on its property. Both may be taxed, and it will not be double taxation.⁷⁶ Some of the courts have held that the capital stock and the property of a corporation and the property of the individual shareholders in their shares are distinct property interests, and that the taxation of both does not amount to double taxation, and is authorized.⁷⁷ Other courts hold that this is double taxation, and in a number of states it is expressly provided that, where a corporation is taxed on its capital stock or property, the stockholders shall not be taxed on their shares.⁷⁸ In Maryland, by the declaration of rights, every owner of property is required to pay taxes in proportion to its actual worth. This has been held to prohibit double taxation, and it is held that the payment of a tax on the capital stock of a corporation is a bar to taxation on the corporate property, as the capital stock represents the whole property of the corporation; and this principle has been recognized in other states, though not in all.⁷⁹

⁷⁴ *State of Tennessee v. Whitworth*, 117 U. S. 129, 6 Sup. Ct. 645, 647, 29 L. Ed. 830; *Wright v. Railroad Co.*, 64 Ga. 783; *Boston & Sandwich Glass Co. v. City of Boston*, 4 Metc. (Mass.) 181; *City of Fall River v. County Com'rs of Bristol*, 125 Mass. 567; *State v. Hannibal & St. J. R. Co.*, 37 Mo. 265.

⁷⁵ *State of Tennessee v. Whitworth*, *supra*.

⁷⁶ See *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146, 96 Am. Dec. 715; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953.

⁷⁷ *Ogden v. City of St. Joseph*, 90 Mo. 522, 3 S. W. 25; *Farrington v. Tennessee*, 95 U. S. 686, 24 L. Ed. 558; *Sturges v. Carter*, 114 U. S. 521, 5 Sup. Ct. 1014, 29 L. Ed. 240; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; *State Bank of Virginia v. City of Richmond*, 79 Va. 113; *Danville Banking & Trust Co. v. Parks*, 88 Ill. 170; *Belo v. Commissioners*, 82 N. C. 415, 33 Am. Rep. 688; *City of Memphis v. Ensley*, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532.

⁷⁸ See article by Edward C. Moore, Jr., Esq., 19 Am. Law Rev. 755. See *Griffith v. Watson*, 19 Kan. 23; *Burke v. Badlam*, 57 Cal. 594; *Osborn v. Railroad Co.*, 40 Conn. 494; *Salem Iron Factory Co. v. Inhabitants of Danvers*, 10 Mass. 514.

⁷⁹ See 19 Am. Law Rev. 757; *State v. Sterling*, 20 Md. 520; *State v. Cumberland & P. R. Co.*, 40 Md. 22; *County Com'rs of Frederick Co. v. Farmers' & Mechanics' Nat. Bank*, 48 Md. 117; *Jones v. Davis*, 35 Ohio St. 474; *Whitney*

Place of Taxation.

Personal property, including shares of stock, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile; but for the purposes of taxation it may be separated from him, and he may be taxed on its account at the place where it is actually located.⁸⁰ Shares of stock in a domestic corporation may therefore be taxed at the place within the state where the corporation is located, without regard to the place of residence of the holders; and the state may tax the shares of nonresidents as well as of residents.⁸¹ When a contrary rule is not declared by statute, the situs of shares of stock, for the purpose of taxation, is the residence of the owner.⁸² Shares in a foreign corporation may be taxed to a resident owner.⁸³

Restrictions in the Federal Constitution—Federal Corporations.

The constitution of the United States imposes some limitations upon the taxing power of the states. We can only mention these shortly, leaving the reader to follow up the subject by referring to works on taxation and constitutional law.

Under the constitutional provision that no state shall deny to any person within its jurisdiction the equal protection of the laws, a state cannot impose unequal taxation; but all taxes must be uniform, and must be uniformly assessed. Corporations are persons within the protection of this rule.⁸⁴

v. City of Madison, 23 Ind. 331. Contra, Lackawanna Iron & Coal Co. v. Luzerne Co., 42 Pa. 424.

⁸⁰ Tappan v. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189.

⁸¹ So as to shares in national banks. 13 Stat. 112; Tappan v. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; Town of St. Albans v. National Car Co., 57 Vt. 68.

⁸² Ogden v. City of St. Joseph, 90 Mo. 522, 3 S. W. 25.

⁸³ Cooley, Tax'n, 22; Sturges v. Carter, 114 U. S. 521, 5 Sup. Ct. 1014, 29 L. Ed. 240; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

⁸⁴ By section 4 of the thirteenth article of the constitution of California, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured," is treated, "for the purposes of assessment and taxation, as an interest in the property affected thereby"; and, "except as to railroad and other quasi public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. But by section 10 of the same article, "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county" are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein; no deduction from this value being allowed for any mortgages on the property. It has been held that in the different modes thus prescribed of assessing the

If the state, in granting a charter, has stipulated that it will not tax the corporation, or that it will tax it in a certain way only, or on certain property only, or to a certain amount only, it cannot afterwards tax in violation of the stipulation, without violating the clause of the federal constitution, by which it is declared that no state shall pass any law impairing the obligation of contracts. This subject will be more fully explained on a subsequent page.⁸⁵

A state cannot tax United States government bonds. Therefore it cannot tax the capital of corporations—like national banks, for instance—which is invested in such bonds.

A state can impose no tax upon railroad or other corporations that amounts to a regulation of or interference with foreign or interstate commerce, for by the federal constitution the power to regulate commerce is vested exclusively in congress. Thus a state could not impose a tax upon freight or passengers transported by a railroad company into or through the state. A state law imposing a tax on freight or passengers, so far as it applies to articles or persons carried through the state, or taken up in the state and carried out of it, or taken up out of the state and brought into it, is unconstitutional and void.⁸⁶ But a state may tax a corporation on freight or passengers transported from point to point in the state. And a tax upon the gross receipts of a railroad company, after they have reached its treasury, is not an interference with interstate commerce, though part of the receipts may have been derived from transportation of persons or property into, out of, or through the state.⁸⁷ The same principles apply to telegraph companies and all other corporations engaged in interstate or foreign commerce.⁸⁸ The effect of the interstate commerce clause of the federal constitution on the power of the states to tax foreign corporations is considered in dealing with the law relating to foreign corporations.⁸⁹

value of the property of natural persons and the property of railroad corporations, as the basis of taxation, there is a departure from the rule of equality and uniformity. Railroad Tax Cases (C. C.) 13 Fed. 722.

⁸⁵ Post, p. 225.

⁸⁶ State Freight Tax Case, 15 Wall. (U. S.) 232, 21 L. Ed. 146; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 744, 745.

⁸⁷ State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, 21 L. Ed. 164. But, if the tax is levied specifically upon the gross receipts for the carriage of freight or passengers into, out of, or through the state, it is void. Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. Ed. 888; Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200.

⁸⁸ Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067.

⁸⁹ Post, p. 607.

Since the states have no power, by taxation or otherwise, to impede or in any manner control the operation of the constitutional laws enacted by congress to carry into effect the powers vested in the national government, it follows that, where congress creates a corporation as a means of executing a power conferred by the federal constitution,⁹⁰ the franchises of the corporation cannot be taxed by a state without the consent of congress.⁹¹ A state, however, may tax property owned by the corporation within its limits, and it may tax shares in the corporation against resident owners.⁹²

The states can exercise no control over national banks, nor in any way affect their operation, except in so far as congress may see fit to permit.⁹³ The franchises, therefore, of a national bank, could not be taxed by a state. Congress, in the national banking act, has expressly declared the shares in national banks to be taxable by the states against the holders as personal property,⁹⁴ provided "the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such state,"⁹⁵ and provided shares owned by nonresidents shall be taxed where the bank is located. Real property of national banks is also declared taxable by the states. Capital of national banks invested in United States government bonds is, of course, not taxable.

Exemption from Taxation.

Some of the state constitutions expressly prohibit the legislature from granting exemptions from taxation, except to charitable institutions, and in certain other special cases. And some of the state courts have held, independently of any such prohibition, that the taxing power of the state is a power which the legislature cannot barter away, and that a grant of exemption from taxation is revocable.⁹⁷

⁹⁰ Ante, p. 34.

⁹¹ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150.

⁹² *McCulloch v. Maryland*, supra; *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5, 21 L. Ed. 787.

⁹³ *Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196.

⁹⁴ This allows taxation of shares in national banks against other national banks which may hold them. *National Bank v. City of Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689.

⁹⁵ Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502]. As to the effect of this provision, see *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Boyer v. Boyer*, 113 U. S. 689, 5 Sup. Ct. 706, 28 L. Ed. 1089; *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94; *National Bank v. City of Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689; *Whitbeck v. Bank*, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118.

⁹⁷ *Mechanics' & Traders' Branch of State Bank v. Debolt*, 1 Ohio St. 591;

But, according to the decisions of the supreme court of the United States, and the decisions of most of the state courts, in the absence of constitutional restrictions, a state may, in granting a charter, stipulate that the corporation shall be exempt from taxation, or that it shall be taxable only to a certain amount, or on certain property, or in a certain way; and if it does so in clear and unmistakable terms, it cannot afterwards impose a tax in violation of the charter, without impairing the obligation of its contract with the corporation, and so violating the federal constitution.⁹⁸

If an exemption of the property of a corporation from taxation, conceded by an act of the legislature, was spontaneous, and no service or duty or other condition was imposed upon the corporation, it may be revoked at the pleasure of the legislature, for there is no consideration.⁹⁹

It is well settled that exemption from taxation must be expressed in the charter in clear and unmistakable terms. An intention to grant exemption can never be implied from doubtful language. In this respect a charter will be strictly construed, and every doubt will be resolved in favor of the state and against the corporation.¹⁰⁰ For example, it has been held that an exemption of the capital stock of the corporation from taxation is not necessarily to be taken as an exemption of property into which the capital stock has been converted.¹⁰¹ And a grant to one company of the powers and privileges

Bank of Toledo v. City of Toledo, 1 Ohio St. 622; *Skelly v. Bank*, 9 Ohio St. 606; *Mott v. Railroad Co.*, 30 Pa. 9, 72 Am. Dec. 664. And see *West Wisconsin Ry. Co. v. Board of Sup'rs*, 35 Wis. 257.

⁹⁸ *Jefferson Branch Bank v. Skelley*, 1 Black (U. S.) 436, 17 L. Ed. 173; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430, 19 L. Ed. 495; *Wilmington R. R. v. Reid*, 13 Wall. (U. S.) 264, 20 L. Ed. 568; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. 198, 30 L. Ed. 411; *Northwestern University v. People*, 99 U. S. 309, 25 L. Ed. 387. *Nichols v. Northampton Co.*, 42 Conn. 103; *Bank of Commerce v. McGowan*, 6 Lea (Tenn.) 703; *Mobile & O. R. Co. v. Moseley*, 52 Miss. 127; *Neustadt v. Railroad Co.*, 31 Ill. 484; *Wicomico County Com'rs v. Bancroft*, 135 Fed. 977, 70 C. C. A. 287; *Detroit, G. H. & M. Ry. Co. v. Powers* (C. C.) 138 Fed. 264.

⁹⁹ *Rector, etc, of Christ Church v. County of Philadelphia*, 24 How. (U. S.) 300, 16 L. Ed. 602; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527, 22 L. Ed. 805; *Wilmington & W. R. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652, affirmed, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Grand Lodge v. City of New Orleans*, 166 U. S. 143, 17 Sup. Ct. 523, 41 L. Ed. 951.

¹⁰⁰ *Delaware Railroad Tax*, 18 Wall. (U. S.) 206, 21 L. Ed. 888; *People v. Commissioners of Taxes*, 82 N. Y. 459; *People v. Tax Com'rs*, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, affirming 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674, and cases cited in the following notes.

¹⁰¹ *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091; *Shelby*

of another, for the purpose of making and repairing a railroad, does not include an exemption from taxation, which was one of the privileges of the other company.¹⁰² And an exemption of the real estate of a charitable corporation from taxation cannot be construed as exempting it from an assessment for a local improvement.¹⁰³

If the legislature has reserved the power to repeal, alter, or amend the charter of a corporation, which it has exempted in whole or in part from taxation, the exemption is subject to revocation.¹⁰⁴ And, under such a reservation, if the charter fixes the taxes which the corporation shall be required to pay at a certain amount, they may be increased.¹⁰⁵

The cases do not agree as to what property of a corporation is exempt from taxation under a general exemption clause. There is no doubt that such a clause exempts all property that is reasonably necessary to carry out the objects for which the company was created.¹⁰⁶ It would also seem clear that such a clause exempts prop-

County v. Union & P. Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650; *Central Railroad & B. Co. v. Wright*, 164 U. S. 327, 17 Sup. Ct. 80, 41 L. Ed. 454.

¹⁰² *Annapolis & Elk Ridge R. Co. v. Commissioners*, 103 U. S. 1, 26 L. Ed. 359; *Wilmington & W. R. Co. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652, affirmed, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Philadelphia, W. & B. R. Co. v. Maryland*, 10 How. 376, 13 L. Ed. 461. Contra, *Nichols v. New Haven & Northampton Co.*, 42 Conn. 103. And compare *State Treasurer v. Auditor General*, 46 Mich. 224, 9 N. W. 258.

¹⁰³ *Roosevelt Hospital v. Mayor, etc., of City of New York*, 84 N. Y. 108.

¹⁰⁴ *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454, 21 L. Ed. 204. And see *Nichols v. New Haven & Northampton Co.*, 42 Conn. 103; *Morris & E. R. Co. v. Commissioners of Railroad Taxation*, 37 N. J. Law, 228; *West Wisconsin Ry. Co. v. Board of Sup'rs of Trempealeau Co.*, 35 Wis. 257; *Citizens' Sav. Bank v. City of Owensboro*, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. Ed. 840; *City of Louisville v. Bank of Louisville*, 174 U. S. 439, 19 Sup. Ct. 753, 43 L. Ed. 1039; *Northern Central Ry. Co. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 63, 47 L. Ed. 167; *Northern Bank of Kentucky v. Stone* (C. C.) 88 Fed. 413. Where a railroad company was exempted from all other taxes on payment of a percentage of its gross earnings, the power to alter, amend, or repeal could not be exercised, so as to continue in full the obligation as to payment of the percentage of gross earnings and at the same time deny to the company, either in whole or in part, the exemption conferred upon it. *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162. See, also, *Duluth & I. R. R. Co. v. County of St. Louis*, 179 U. S. 302, 21 Sup. Ct. 124, 45 L. Ed. 201.

¹⁰⁵ *Union Passenger Ry. Co. v. Philadelphia*, 101 U. S. 528, 25 L. Ed. 912.

¹⁰⁶ In *Lehigh Coal & Nav. Co. v. Northampton Co.*, 8 Watts & S. (Pa.) 334, it was held that, inasmuch as an incorporated canal was not taxable by the laws of Pennsylvania, not only the bed, berme bank, and tow path of the canal, but also the lock houses and collectors' officers, were exempt, as they were considered constituent parts of the canal, or necessarily incident there-

erty which, though it might be dispensed with, is obviously appropriate and convenient for such purpose, for such property may well be said to be necessary.¹⁰⁷ It does not, however, exempt property which is not necessary, and which is not obviously appropriate and convenient, though it may be property which the corporation is authorized to hold.¹⁰⁸

Where it is held that the property of stockholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, a tax on shares of stock in the hands of the stockholders is not a tax on the capital of the corporation, in violation of an exemption. Thus the capital of national banks invested in United States securities is not taxable by the states, but shares of the stock in the hands of the individual stockholders may be taxed without deduction on account of such an investment.¹⁰⁹ So the franchises of a corporation may be taxed without deduction for a portion of its capital invested in government bonds.¹¹⁰ If a corporation is exempt from taxation, it cannot be taxed by a statute which purports to tax the shares of stockholders, but which requires the tax to be paid by the corporation, leaving it to collect the amount so paid

to. And in *Railroad v. Berks Co.*, 6 Pa. 70, it was held that the exemption of a railroad covered water stations and depots, including the offices, oil houses, places to hold cars, etc., such places being necessary to the construction and operation of the road.

¹⁰⁷ In *Camden & A. Railroad & Transp. Co. v. Commissioners of Mansfield*, 23 N. J. Law, 510, 57 Am. Dec. 409, it was said that property of a corporation is exempt from taxation, under a general exemption clause, only in so far as it is necessary, and not merely convenient, for the company to acquire and hold for the purposes for which it was incorporated; but in a later case it was held that this dictum was too narrow, and that the exemption includes whatever is obviously appropriate and convenient in carrying into effect the franchise granted. *New Jersey Railroad & Transp. Co. v. Hancock*, 35 N. J. Law, 545. And see *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 456.

¹⁰⁸ In *Railroad Co. v. Berks Co.*, it was held that the exemption of a railroad from taxation, while it covered water stations, depots, offices, oil houses, places to hold cars, etc., did not include warehouses, coal lots, coal shutes, and wood yards used or intended to be used as depots for merchandise, coal, wood, etc., for transportation, and machine shops for the manufacture of engines. In *Camden & A. Railroad & Transp. Co. v. Commissioners of Mansfield*, 23 N. J. Law, 510, 57 Am. Dec. 409, it was held that exemption of a railroad company from taxation did not include dwelling houses and lots of land situated near the line of their road, and used exclusively by workmen and mechanics in the employ of the company. Compare *Northwestern University v. People*, 99 U. S. 309, 25 L. Ed. 387; *Ramsey County v. Chicago, M. & St. P. Ry. Co.*, 33 Minn. 537, 24 N. W. 313; *Todd v. St. Paul, M. & M. Ry. Co.*, 38 Minn. 163, 36 N. W. 109.

¹⁰⁹ *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, 18 L. Ed. 229; *National Bank v. Com.*, 9 Wall. (U. S.) 353, 19 L. Ed. 701.

¹¹⁰ *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146, 96 Am. Dec. 715.

from the stockholders, without regard to whether there may be any profits to be paid to the stockholders.¹¹¹

Ultra Vires.

The doctrine of ultra vires cannot be set up to defeat liability for taxes any more than it can be set up to defeat liability for torts, or to escape responsibility for a misdemeanor. A corporation cannot escape the taxes due upon its property or business on the ground that it was not authorized to acquire the property or to engage in the business.¹¹²

Foreign Corporations.

The right of a state to tax a foreign corporation doing business within its limits has nothing to do with the present subject,—the power of the state over corporations of its own creation,—and is considered in treating of foreign corporations in a subsequent chapter.¹¹³

¹¹¹ *New Orleans v. Houston*, 119 U. S. 285, 7 Sup. Ct. 198, 30 L. Ed. 411.

¹¹² *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176, 2 *Cumming, Cas. Priv. Corp.* 107.

¹¹³ *Post*, p. 602.

CHAPTER IX.

DISSOLUTION OF CORPORATIONS.

82. How Dissolution is Effected.

83-84. Equity Jurisdiction.

85. Effect of Dissolution.

HOW DISSOLUTION IS EFFECTED.

82. Unless otherwise provided by statute, a private corporation may be dissolved only in five ways:

- (a) By the weight of authority, by expiration of its charter.**
- (b) By an act of the legislature repealing its charter, under the power of repeal reserved by the state in granting the charter.**
- (c) By the loss of an essential integral part, which cannot be supplied; as by the death or withdrawal of all the members, where there are no means of supplying their places.**
- (d) By surrender of its charter with the consent of the state.**
- (e) By forfeiture of its charter for misuser or nonuser of its powers.**

But

- (1) A forfeiture only takes effect upon the judgment of a competent court ascertaining and decreeing a forfeiture, unless the legislature has clearly provided otherwise.**
- (2) Where the acts or omissions of which the corporation has been guilty are, by statute, expressly made a cause of forfeiture, the court has no discretion to refuse a judgment of forfeiture. But in other cases the court has a discretion to determine from the circumstances whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be merely ousted from the exercise of the powers illegally assumed.**
- (3) The legislature, as the representative of the state, may waive the right to insist upon a cause of forfeiture, as by acts recognizing the right of the body to continue as a corporation. But, to constitute a waiver, the acts must be inconsistent with the intention to insist upon a forfeiture.**
- (4) The forfeiture must be enforced by the state, by its authorized representative. It cannot be enforced or insisted upon by private individuals, either collaterally or directly.**
- (5) A forfeiture may be enforced by scire facias where there is a legal existing body, capable of acting, but who have abused their power; or by an information in the nature of quo warranto where the body is merely a corporation de facto, or where it is neither a corporation de facto nor de jure. The procedure is now generally fixed by statute.**

These are the only ways mentioned in the books by which a corporation can cease to exist. It can be dissolved in no other way, except by express statutory provision.¹

Expiration of Charter.

According to the better opinion, and by the weight of authority, after the period of existence of a corporation has expired by force of express provision in its charter, or in a general law, it becomes ipso facto dissolved, and no longer has any existence at all, either de jure or de facto, for there is no law under which it can longer exist.² Some courts hold, contrary to this proposition, that the fact that the charter of a corporation has expired does not terminate its existence, so as to prevent it from doing business, and suing and being sued; that it remains a de facto corporation, and subject to all the rules relating to such bodies, including the rule that its existence and right to do business can only be questioned by the state in a direct proceeding.³

Dissolution by Act of the Legislature.

As shown in a former chapter, the British parliament is, in theory at least, omnipotent, there being no constitutional restraints upon its action; and in England, therefore, corporations hold their charters at the will of the legislature. But in this country the power of the state legislatures and of congress is greatly restricted by constitutional provisions, the chief one of which, as far as the present subject is concerned, is the provision contained in the federal constitution, and also in most of the state constitutions, that no state shall pass any law impairing the obligation of contracts. The charter of a corporation, as we have seen, is a contract between the state and the corporators, and the state cannot dissolve a corporation which it has created, without the consent of the corporators,⁴ unless it has reserved the right to do so, or unless the corporation has been guilty of such an abuse of its franchises as to forfeit its charter. And even in the latter case, as we shall see, the forfeiture must generally be judicially ascertained and

¹ Folger v. Insurance Co., 99 Mass. 267, 96 Am. Dec. 747; Morley v. Thayer (C. C.) 3 Fed. 737, 748; Swan Land & C. Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577.

² Bradley v. Reppell, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585; Sturges v. Vanderbilt, 73 N. Y. 384; Dobson v. Simonton, 86 N. C. 492; Krutz v. Town Co., 20 Kan. 397; La Grange & M. R. Co. v. Rainey, 7 Cold. (Tenn.) 432; Supreme Lodge of Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891; Clark v. American Cannel Coal Co., 35 Ind. App. 65, 73 N. E. 727; 2 Mor. Corp. § 1006.

³ Miller v. Coal Co., 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903; Bushnell v. Machine Co., 138 Ill. 67, 27 N. E. 596.

⁴ Ante, p. 201.

declared.⁵ Whether the state has reserved the right to repeal a charter, and thereby dissolve the corporation, is to be determined from the terms of the charter, and of such statutes as apply to the corporation, and so form a part of its charter. A corporation is dissolved and ceases to exist for any purpose as a body corporate upon the repeal of its charter by the legislature, by virtue of a power reserved in creating it.⁶ And a corporation is dissolved by a repeal of its charter, where there is no reservation of power to repeal, if it accepts the repeal.⁷ This, however, is a surrender of its charter with the consent of the legislature.⁸

Loss of Integral Part—Death or Loss of Members.

"A corporation," said Chancellor Kent, "may also be dissolved when an integral part of the corporation is gone, without whose existence the functions of the corporation cannot be exercised, and when the corporation has no means of supplying that integral part, and has become incapable of acting. The incorporation becomes then virtually dead or extinguished."⁹ If all the members of a corporation should die or withdraw, and there were no way in which new members could come in, dissolution would necessarily result. To work a dissolution because of the loss of an integral part of the corporation, there must be a permanent incapacity to restore the part.¹⁰ Thus it has been held that dissolution does not result from an omission to continue the succession to certain offices, which are essential to the existence of the corporation, where the offices are in fact exercised by officers de facto, or even where there are no officers at all, if it is possible for the offices to be filled by an election or otherwise.¹¹ The statement that a corporation is dissolved by the death of all its members can have no application to modern business corporations, since the shares, being property,

⁵ Post, p. 235.

⁶ Thornton v. Railway Co., 123 Mass. 32, 1 Cumming, Cas. Priv. Corp. 462, W. D. Smith, Cas. Corp. 167, Shep. Cas. Corp. 246; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Greenwood v. Union Freight Co., 105 U. S. 13, 26 L. Ed. 961.

⁷ Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157.

⁸ Post, p. 233.

⁹ 2 Kent, Comm. 308, 309; King v. Pasmore, 3 Term R. 199; Phillips v. Wickham, 1 Paige (N. Y.) 590.

¹⁰ Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111. And see Nicolai v. Maryland Agricultural & M. Ass'n, 96 Md. 323, 53 Atl. 965.

¹¹ Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., supra; Phillips v. Wickham, 1 Paige (N. Y.) 590; Russell v. McLellan, 14 Pick. (Mass.) 63; Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175. And see In re Belton, 47 La. Ann. 1614, 18 South. 642.

pass by assignment, bequest, or descent, and must ever remain the property of some persons, who must, of necessity, be members of the corporation as long as it may exist.¹²

Where a corporation is legally organized by the requisite number of persons, the fact that one person becomes the owner of all the shares of stock does not dissolve the corporation. It is still a corporation aggregate, and the stock may be transferred, and so distributed again. The property of the corporation remains vested in it, and suits on causes of action accruing in favor of or against it are brought by or against it as a corporation.¹³ It has been held that in such an event the operation of the charter is suspended until, by a transfer of part of the stock, other members come in;¹⁴ but this is very doubtful, to say the least.¹⁵

Surrender of Charter.

It has been said that a corporation may be dissolved by the voluntary surrender of its charter; but this statement is too broad. Such a surrender cannot work a dissolution without an acceptance of the surrender, or consent on the part of the state. As was said by Morton, J., in a Massachusetts case: "Charters are in many respects compacts between the government and the corporators. And, as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal, solemn act of the corporation; and it will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to

¹² *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 1 Cumming, Cas. Priv. Corp. 478, W. D. Smith, Cas. Corp. 165, Shep. Cas. Corp. 244.

¹³ Ante, p. 5; *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131, 1 Cumming, Cas. Priv. Corp. 38; *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Louisville Banking Co. v. Elsenman*, 94 Ky. 83, 21 S. W. 531, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335; *Swift v. Smith*, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 338; *Russell v. McLellan*, 14 Pick. (Mass.) 63; *In re Belton*, 47 La. Ann. 1614, 18 South. 642; *Harrington v. Connor*, 51 Neb. 214, 70 N. W. 911; *First Nat. Bank v. Winchester*, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904; *Ceo. T. Stagg Co. v. E. H. Taylor, Jr. & Sons*, 68 S. W. 863, 24 Ky. Law Rep. 495.

¹⁴ *Swift v. Smith*, supra; *Louisville Banking Co. v. Elsenman*, supra.

¹⁵ Cases cited in note 7a, supra; *Russell v. McLellan*, 14 Pick. (Mass.) 70; *Newton Manuf'g Co. v. White*, 42 Ga. 148.

exist.”¹⁶ Frequently the statute provides a manner of voluntary dissolution for corporations organized under general laws.*

Where a statute authorizes a corporation to surrender its charter, and transfer its property, rights, etc., to another corporation, and provides that upon such surrender and transfer, and acceptance thereof by the other corporation, the said charter shall be vacated and annulled, such a surrender, transfer, and acceptance result in a dissolution of the corporation, and it no longer exists as such for any purpose.¹⁷ A corporation is dissolved on a repeal of its charter, and an acceptance of the repeal by it.¹⁸

A corporation cannot dissolve itself, before the expiration of the period fixed by its charter, without the consent of all the shareholders, unless such dissolution is provided for in the charter.¹⁹

Loss or Surrender of Property.

The possession of property is not at all essential to corporate existence; and it follows, therefore, that the insolvency of a corporation, or the transfer or loss of all its property, cannot work a dissolution.²⁰ Of course, if a corporation, by an assignment of all its property, violates its charter, the state may enforce a forfeiture; but that is a different question.

Where a statute declares that the stockholders of a corporation shall be liable for all debts due and owing by it at the time of its dissolution, it has been held that it is sufficient dissolution within the meaning of the statute if a corporation becomes totally insolvent, and suspends its business.²¹ But such insolvency and suspension of business

¹⁶ *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 1 Cumming, Cas. Priv. Corp. 478, W. D. Smith, Cas. Corp. 165, Shep. Cas. Corp. 244. And see *Mylrea v. Railway Co.*, 93 Wis. 604, 67 N. W. 1138; *Economy Building & L. Ass'n v. Paris Ice Mfg. Co.*, 68 S. W. 21, 24 Ky. Law Rep. 107.

* Under a provision of statute authorizing stockholders by resolution to discontinue business, such a resolution operates as a voluntary surrender of the corporate franchise, and a dissolution of the corporation. *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858. See *Taylor, Priv. Corp.* § 434.

¹⁷ *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. Ed. 945, 1 Cumming, Cas. Priv. Corp. 459.

¹⁸ *Port Gibson v. Moore*, 13 Smedes & M. (Miss.) 157.

¹⁹ *Barton v. Association*, 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608.

²⁰ 2 Kent, Comm. 309, 310; *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 1 Cumming, Cas. Priv. Corp. 478; W. D. Smith, Cas. Corp. 165, Shep. Cas. Corp. 244; *Parker v. Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 81 L. R. A. 706; *Reichwald v. Hotel Co.*, 106 Ill. 439; *In re Belton*, 47 La. Ann. 1614, 18 South. 642; *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; *State v. Mitchell*, 104 Tenn. 336, 58 S. W. 365.

²¹ *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 278; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454.

does not dissolve a corporation for other purposes. It is merely a quasi dissolution as respects creditors.²² For instance, it would not prevent a receiver of the corporation from maintaining an action in its name against a director or other person against whom the corporation has a right of action.²³

Abandonment of Franchises or Business.

The neglect of a corporation to exercise or use the franchises granted to it by its charter, or the abandonment of its franchises, may be ground for proceedings by the state to enforce a forfeiture of its charter, but it does not, ipso facto, work a dissolution.²⁴ Thus, where a canal company was incorporated, and authorized to maintain a dam for the purpose of supplying its canal, it was held, in effect, that its abandonment of the canal did not of itself work a forfeiture of its charter, and a dissolution, so as to make the maintenance of the dam unlawful, as against third persons.²⁵

Forfeiture of Charter.

A corporation may forfeit its charter and right to corporate existence by an abuse or misuser of its powers and franchises, or by neglect or nonuser. But it is well settled that, as a general rule, the forfeiture can only take effect upon a judgment of a competent tribunal in a proceeding by the state to enforce the forfeiture.²⁶ Whatever

²² *Bank of Niagara v. Johnson*, 8 Wend. (N. Y.) 656; *Bradt v. Benedict*, 17 N. Y. 99; *Barclay v. Talman*, 4 Edw. Ch. (N. Y.) 128, 129; *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858; *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757.

²³ *Bank of Niagara v. Johnson*, supra. The appointment of a receiver of an insolvent national bank does not dissolve it, so as to prevent the recovery of a judgment against it. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595.

²⁴ *Heard v. Talbot*, 7 Gray (Mass.) 113, 1 Cumming, Cas. Priv. Corp. 482; *Morley v. Thayer* (C. O.) 3 Fed. 737, 748; *Parker v. Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; *Russell v. McLellan*, 14 Pick. (Mass.) 63; *Bradt v. Benedict*, 17 N. Y. 93; *Mylrea v. Railway Co.*, 93 Wis. 604, 67 N. W. 1138; *Jones v. Herald Co.*, 44 S. C. 526, 22 S. E. 731; *Richards v. Minnesota Savings Bank*, 75 Minn. 196, 77 N. W. 822; *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858.

²⁵ *Heard v. Talbot*, supra.

²⁶ 2 Kent. Comm. 312; *State v. Real-Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109; *King v. Amery*, 2 Term R. 515; *Colchester v. Seaber*, 3 Burrows, 1866; *Smith's Case*, 4 Mod. 53; *State v. Fourth New Hampshire Turnpike*, 15 N. H. 162, 41 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 593; *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 1 Cumming, Cas. Priv. Corp. 478, W. D. Smith, Cas. Corp. 165, *Shep. Cas. Corp.* 244; *Heard v. Talbot*, 7 Gray (Mass.) 113, 1 Cumming, Cas. Priv. Corp. 482; *Baker v. Backus' Adm'r*, 32 Ill. 79; *John v. Bank*, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; *Receivers of Bank of Circleville v. Renick*, 15 Ohio, 322; *Trustees of Vernon Soc. v. Hills*, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; *Crump v. Mining*

neglect of duty or abuse of power a corporation may be guilty of, it does not, in the absence of express statutory or charter provision, by reason of that alone, lose its corporate existence. Until it has had a hearing before a competent tribunal, and a forfeiture has been judicially declared by judgment of ouster, it continues to be a corporation for all purposes. In *State v. Fourth New Hampshire Turnpike*,²⁷ the defendant corporation had neglected to make returns to the legislature of expenditures and profits, as it was required by its charter to do under penalty of forfeiture, but no proceedings were taken to obtain a judgment of forfeiture and ouster. It was held that the charter was not forfeited merely by the neglect, but that the corporation continued to exist, so that the right to enforce a forfeiture could be waived by the state. A provision in a charter that the corporation shall do certain things—as that it shall make periodical returns to the legislature of its expenditures and profits—“under forfeiture of the privileges of the act in future,” does not absolutely determine the existence of the corporation on a violation thereof; but the meaning is that the forfeiture shall be proved in the regular, legal manner, and a judgment of forfeiture in proper proceedings by the state is necessary.²⁸

It is perfectly competent, however, for the legislature, in granting a charter, or by an authorized amendment of a charter, to provide that the corporation shall lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the legislature intended to so provide in any case depends upon the construction of the language used. In *Brooklyn Steam Transit Co. v. City of Brooklyn*,²⁹ the act incorporating a street-railroad company provided that, unless it should be organized, and should lay at least a certain amount of its road within a given time, “this act, and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated.” The company organized, and made preparations to build its road, but did not build any portion of it before the expiration of the time limited, when it began to lay foundations for its road in the streets. It was held that under the provisions of the act it had lost its

Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227; *In re Philadelphia & M. Ry. Co.*, 187 Pa. 123, 40 Atl. 967; *Wallamet, etc., Co. v. Kittridge*, 5 Sawy. (U. S.) 44, Fed. Cas. No. 17,105; *State v. Spartanburg, C. & G. Ry. Co.*, 51 S. C. 129, 28 S. E. 145; *Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208, 75 N. W. 987; *Utah, N. & C. R. Co. v. Utah & C. Ry. Co. (C. C.)* 110 Fed. 879.

²⁷ 15 N. H. 162, 41 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 593.

²⁸ *State v. Fourth N. H. Turnpike*, 15 N. H. 162, 41 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 593.

²⁹ 78 N. Y. 524.

corporate franchises, and the right to build the road, and that the city could prevent it from proceeding with the work.⁸⁰

Same—When a Forfeiture will be Decreed.

Where a corporation has been guilty of acts or omissions which, by statute, are expressly made a cause of forfeiture of its franchise to be a corporation, the court, in proceedings by the state, to enforce such forfeiture, has no discretion to refuse a judgment.⁸¹ But in other cases the court is vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be merely ousted from the exercise of the powers illegally assumed.⁸² In arriving at a determination of this question, the court will take into consideration, not only the interests of the public, but also the interests of the stockholders, and of creditors; and the extent to which corporate powers have been exceeded, the character of the acts done, etc., will be considered. Thus, though a building and loan association had been guilty of direct and repeated violations of its charter, the court, with some hesitation, however, gave judgment of ouster merely from the exercise of the powers illegally assumed, as it appeared that the corporation, if permitted, could wind up its affairs in a few months, and if it should be dissolved, it would be necessary to appoint trustees to wind it up under the statute, which would occasion delay, and involve increased expense.⁸³ One of the judges dissented on the ground that the violations of its charter were

⁸⁰ And see *In re Brooklyn, W. & N. Ry. Co.*, 72 N. Y. 245; *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181. Cf. *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088, where it was held that a provision in the charter of a bridge corporation that the bridge shall be commenced within two years, "or this act and all rights and privileges granted hereby shall be null and void," was not self-executing. After referring to the above New York cases, the decision says: "It requires, however, strong and unmistakable language, such as each of the cases presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney general." And see *Utah, N. & C. Ry. Co. v. Utah & C. Ry. Co.* (C. C.) 110 Fed. 879; *Nicolai v. Maryland Agricultural & M. Ass'n*, 96 Md. 323, 53 Atl. 965.

⁸¹ *State v. Pennsylvania & Ohio Canal Co.*, 23 Ohio St. 121; *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258, 1 Cumming, Cas. Priv. Corp. 566; *State v. Minnesota Central Ry. Co.*, 36 Minn. 246, 30 N. W. 816.

⁸² *State v. Oberlin Building & Loan Ass'n*, *supra*.

⁸³ *State v. Oberlin Building & Loan Ass'n*, *supra*. An information in the nature of quo warranto against a building and loan association to forfeit its charter for misuser of its franchise was sufficient, where it showed that it unlawfully assumed privileges and franchises not granted it in using "full-paid stock" secured by pledges of its other stock, and by deeds of trust to secure the redemption and payment of said full-paid stock and in acting as surety. *State v. Equitable Loan & I. Co.*, 142 Mo. 325, 41 S. W. 916.

so flagrant and persistent as to call for the severest penalties of the law, and he was in favor of a judgment of ouster from the franchise of being a corporation. "To justify forfeiture of corporate existence," said Judge Finch in a late New York case, "the state, as prosecutor, must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare; for the state does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action."⁸⁴

Thus, where a corporation enters into a partnership or association of independent corporations through the medium of a trust or other combination, for the purpose of obtaining a monopoly, disregarding all the

⁸⁴ *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843, 1 Cumming, Cas. Priv. Corp. 570. So, in *State v. Minnesota Thresher Manuf'g Co.*, 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510, it was held that the object of proceedings by quo warranto is to protect public interests, and therefore, to warrant a forfeiture of corporate franchises for misuser, the misuser must be such as to work or threaten a substantial injury to the public. In the syllabus by the court it is said: "Acts ultra vires, or in excess of powers, are not necessarily a misuser of franchises, such as will warrant their forfeiture. To justify such forfeiture, the ultra vires acts must be so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. Ultra vires acts may be such as to justify interference by the state by injunction to prevent a continuance of the excess of powers, while they would not be a sufficient ground for a forfeiture of the corporate franchises in proceedings by quo warranto. If the unauthorized acts affect merely stockholders and creditors who have an adequate legal remedy, the state will not interfere." And see *State v. Portland Natural Gas & O. Co.*, 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; *People v. Rosenstein Cohn C. Co.*, 131 Cal. 153, 63 Pac. 163; *Illinois Trust & S. Bank v. Doud*, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; *State v. Southern Building & L. Ass'n*, 132 Ala. 50, 31 South. 375; *State v. Twin Village Water Co.*, 98 Me. 214, 56 Atl. 763; *State v. United States Endowment & T. Co.*, 140 Ala. 610, 37 South. 442, 103 Am. St. Rep. 60; *State v. Cumberland Telephone & Telegraph Co.*, 114 Tenn. 194, 86 S. W. 390. If an insurance company makes contracts of insurance, and accepts premiums, when it is in such a condition that there is no probability of its ever being able to pay losses, it is guilty of such an abuse of its franchises, as affords ground for forfeiture. *Ward v. Farwell*, 97 Ill. 593. For other instance of abuses held ground for forfeiture, see *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267; *State v. Topeka Water Co.*, 59 Kan. 151, 52 Pac. 422; *State v. Debenture Guarantee & L. Co.*, 51 La. Ann. 1874, 26 South. 600; *Independent Medical College v. People*, 182 Ill. 274, 55 N. E. 845; *State v. New Orleans Waterworks Co.*, 107 La. 1, 31 South. 395.

statutory restraints as to the consolidation of corporations, and the rules of law prohibiting combinations in restraint of trade, it is guilty of such a violation of its charter, and such failure to perform its corporate duties, as renders it liable to dissolution in proceedings by the state.⁸⁵

Continued suspension of corporate franchises, and a failure to perform the implied conditions upon which the charter was granted, amount to a nonuser, for which the charter may be forfeited.⁸⁶ But neither a mere temporary suspension of operations, nor an assignment for the benefit of creditors, is alone sufficient ground for forfeiture.⁸⁷

Where a penalty is fixed by the charter or statute under which a corporation is organized for the omission or commission of a particular act, it has been held that the penalty prescribed is the only punishment that can be inflicted for doing or omitting to do the act, and that it is no ground for forfeiture, the presumption being that the legislature intended the penalty as satisfaction for the breach.⁸⁸ But the mere fact that the statute authorizes the court in its discretion to assess a fine, instead of rendering a judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, is not a ground for denying a judgment of ouster, if the abuse goes to the object of the incorporation.*

⁸⁵ *People v. North River Sugar-Refining Co.*, *supra*. And see *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319. But see *U. S. v. E. O. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Henderson Loan & R. E. Ass'n v. People*, 163 Ill. 196, 45 N. E. 141; *State v. Portland Natural Gas & O. Co.*, 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; *People v. Plainfield Ave. Gravel Road Co.*, 105 Mich. 9, 62 N. W. 998. Under a provision of statute requiring corporations to have their place of business and to keep their books within the state, it is incumbent on a corporation so to do, to an extent necessary to the fullest jurisdiction and visitatorial powers of the state, and for failure to comply substantially therewith the charter may be vacated. *State v. Park & Nelson Lumber Co.*, 58 Minn. 330, 59 N. W. 1048, 49 Am. St. Rep. 516.

⁸⁶ *State v. Commercial Bank of Manchester*, 13 Smedes & M. (Miss.) 569, 53 Am. Dec. 106; *State v. Real-Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109. As where a railroad company, without authority of law, leases its road to another company, with all its rights, property, and franchises, for a long period of time, and abandons the operation of its road. *State v. Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

⁸⁷ *State v. Commercial Bank of Manchester*, *supra*.

⁸⁸ *State v. Real-Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109.

* *People v. Kankakee River Imp. Co.*, 103 Ill. 491. And see *State v. Capital City Dairy Co.*, 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181. And see *People v. Buffalo Stone & C. Co.*, 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240.

If a corporation has not complied with the law in its organization, so that, though it is a corporation de facto, it is not a corporation de jure, the remedy is by quo warranto by the state. Private individuals, as we have seen, cannot attack the existence of the corporation, or question its right to do business.³⁹ In quo warranto by the state, however, its charter will be forfeited. Thus, where the state, by quo warranto proceedings, directly challenged the right of certain persons to act as a railway corporation, and it appeared that many of the subscribers for the stock were notoriously insolvent, and had no expectation, at the time they subscribed, of ever paying their subscription, thus leaving the amount subscribed in good faith less than that required by the statute, it was held that a judgment of forfeiture was proper.⁴⁰ So, where a corporation is illegally formed by a trust combination for the purpose of obtaining a monopoly in the manufacture and sale of an article, and controlling the production, and the price, quo warranto will lie.⁴¹

Same—Waiver of Forfeiture.

It is well settled that the state may waive the right to insist upon a forfeiture of the charter of a corporation because of a violation thereof, just as one individual may waive the right to object to the breach of a term of his contract with another. And such a waiver is generally established by showing that the legislature, with knowledge of the ground of forfeiture, recognized the continued existence and right to existence of the corporation.⁴² Thus, where the charter of a turnpike corporation required it to make returns to the legislature, every sixth year, of its expenditures and profits, under penalty of forfeiture, and the corporation failed to make such returns for over twenty years, it was held that the legislature, by accepting and acquiescing in returns made after such violation of the charter, and also by passing an act authorizing the corporation to change its route, waived any right it may have had to insist upon a forfeiture.⁴³ The doctrine of waiver of a forfeiture by the state by subsequent legislative acts does not apply where, by the terms of the charter, the franchise absolutely determines upon failure to perform certain conditions.⁴⁴

³⁹ Ante, p. 78.

⁴⁰ Holman v. State, 105 Ind. 569, 5 N. E. 702.

⁴¹ Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200. See ante, p. 62.

⁴² State v. Real-Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; State v. Fourth New Hampshire Turnpike, 15 N. H. 162, 41 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 593; State v. Bailey, 19 Ind. 452; Mylrea v. Railway Co., 93 Wis. 604, 67 N. W. 1138.

⁴³ State v. Fourth New Hampshire Turnpike, supra.

⁴⁴ State v. Fourth New Hampshire Turnpike, supra.

If the acts relied upon as a waiver of a cause of forfeiture are perfectly consistent with the intention to insist upon a forfeiture, they will not be regarded as a waiver. Thus where a corporation had violated its charter by taking usury, it was held by the New York court that, even conceding that the governor and senate could waive a forfeiture, the right to insist upon a forfeiture was not waived by the act of the governor and senate in appointing a state director of the corporation. "Notwithstanding the existing cause of forfeiture," it was said, "the defendants were a corporation de facto, and might continue to exercise their franchise until judgment of ouster should be pronounced against them. In the meantime it was the duty of the governor and senate, as well as all others, to treat the defendants as a legally existing corporation. The appointment of a state director was, therefore, perfectly consistent with the intention to continue his prosecution, and insist on the forfeiture."⁴⁵

The right to insist upon a forfeiture can be waived only by the legislature, legally acting as such. Neither the attorney general, nor the governor, nor the state senate alone, nor any other man or body of men, save only the legislature, has this power.⁴⁶ The right of the state to enforce a forfeiture will not be defeated by imputation of laches.[†]

Same—The State Only can Enforce Forfeiture.

Proceedings to forfeit the charter of a corporation must be brought directly by the state, or by its authorized representative acting in its name. As a general rule, no advantage can be taken of the misuser or nonuser of its powers and franchises by a corporation, or of failure to comply with conditions subsequent in its charter, by private individuals, either collaterally or directly.⁴⁷ In *Heard v. Talbot*,⁴⁸

⁴⁵ *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431, 35 Am. Dec. 634, 1 Cumming, Cas. Priv. Corp. 597.

⁴⁶ *People v. Phoenix Bank*, supra.

[†] *People v. Pullman Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

⁴⁷ 2 Kent, Comm. 312; *Heard v. Talbot*, 7 Gray (Mass.) 113, 1 Cumming, Cas. Priv. Corp. 482; *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50; *Baker v. Backus' Adm'r*, 32 Ill. 79; *Toledo & A. A. R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492; *Trustees of Vernon Soc. v. Hills*, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; *Crumph v. Mining Co.*, 7 Grat. (Va.) 352, 56 Am. Dec. 116; *John v. Bank*, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 1 Cumming, Cas. Priv. Corp. 478, *W. D. Smith*, Cas. Corp. 165, *Shep. Cas. Corp.* 244; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227; *Bank of Circleville v. Renick*, 15 Ohio, 322; *Olyphant Sewage-Drainage Co. v. Borough of Olyphant*, 196 Pa. 553, 46 Atl. 896. Contra, by statute, *State v. Webb*, 97 Ala. 111, 12 South. 377, 38 Am. St. Rep. 151.

⁴⁸ 7 Gray (Mass.) 113, 1 Cumming, Cas. Priv. Corp. 482.

a canal company, which was authorized to maintain a dam for the purpose of supplying its canal with water, abandoned the use of the canal. Private individuals afterwards brought suit for the flowing of their land by reason of the maintenance of the dam, and contended that the abandonment of the canal worked a forfeiture of the right to maintain the dam, and that its maintenance was, therefore, unlawful. The court held, however, that the abandonment of the canal was merely a violation of its charter by the corporation, and, while it might be cause for forfeiture in proceedings by the state to enforce a forfeiture, it could not thus be taken advantage of collaterally by private individuals.⁴⁹

Nor can private individuals institute direct proceedings to enforce a forfeiture of a charter. An information in the nature of quo warranto may be granted to inquire into the election or admission of an officer or member of a corporation, when moved for by any person interested in or injured by such election or admission. But private persons cannot move for such an information in order to obtain a judgment of forfeiture of the charter of a corporation. Such an information can be prosecuted only by the authority of the state, acting by its proper officers.⁵⁰ This necessarily results from the doctrine that the state may waive a forfeiture.

⁴⁹ The court said in this case: "Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of the charter, and upon due proceedings had, might be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of an act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derive their powers. Individuals, therefore, cannot take it upon themselves, in the assertion of private rights, to insist on breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings duly instituted against the corporation. It would not only be a great anomaly to allow persons, not parties to the contract, to insist on its breach, and enforce a penalty for its violation; but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person who might be aggrieved by their exercise. Therefore, it has been often held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government."

⁵⁰ *Com. v. Union Fire & Marine Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50, 1 Cumming, Cas. Priv. Corp. 599.

Same—Modes of Proceeding to Enforce Forfeiture.

There are at common law two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for misuser or nonuser.⁵¹ One is by scire facias; and that process is proper where there is a legal existing body, capable of acting, but which has abused its power. The other mode is by information in the nature of a quo warranto, which is in form a criminal, and in its nature a civil, remedy; and that proceeding applies where there is a body corporate de facto only, but which takes upon itself to act, though from some defect in its constitution, it cannot legally exercise its powers, or where an association assumes to act as a corporation without even color of authority. Both of these modes of proceeding against corporations are at the instance and on behalf of the state. Private individuals, as we have seen, cannot institute proceedings, unless there is some statute expressly allowing them to do so. The judgment in such proceedings is that the parties be ousted from the exercise of corporate powers and privileges. The mode of proceeding is now very generally prescribed and regulated by statute, and in most states information in the nature of quo warranto is the mode in all cases.

EQUITY JURISDICTION.

83. A court of equity has no jurisdiction unless it is conferred, as in some jurisdictions, by statute, to dissolve a corporation, and distribute its assets, at the suit of a stockholder or any other private individual. Some exceptions to this rule have been recognized.

84. Nor, generally, has a court of equity any jurisdiction to enforce a forfeiture, or enjoin exercise of unauthorized privileges and powers, at the suit of the state; but it may entertain an information to enjoin acts which constitute or threaten a public nuisance or injury, and which require immediate interference, and it may assume jurisdiction in case of a charitable trust where the beneficiaries are numerous and indefinite, and the breach of trust cannot be effectively redressed except by suit in behalf of the public.

At the Suit of Private Individuals.

We shall see in a subsequent chapter that under certain circumstances a court of equity has jurisdiction to control and regulate the management of corporations at the suit of individual stockholders, where its interference is necessary to protect their equitable rights.⁵² But a very different question is presented when a stockholder or any other private individual, comes into a court of equity, and asks

⁵¹ 2 Kent, Comm. 313, 314.

⁵² Post, p. 375.

to have a corporation dissolved, and its assets distributed; and by the overwhelming weight of authority a court of equity has no inherent jurisdiction in such a case.⁵³ Such jurisdiction is sometimes expressly conferred by statute under particular circumstances. Without this, it does not exist. "General jurisdiction of writs against corporations no more implies a power to destroy a corporation at the suit of an individual than jurisdiction of private suits against individuals authorizes the court to entertain a prosecution for crime, to pass sentence of death, and to issue a warrant for execution.

The only modes of dissolving a corporation known to the common law were by the death of all its members; by act of the legislature; by a surrender of the charter, accepted by the government; or by forfeiture of the franchise, which could only take effect upon a judgment of a competent tribunal on a proceeding in behalf of the state; and neither a court of law nor a court of equity had jurisdiction to decree a forfeiture of the charter or dissolution of the corporation at the suit of an individual."⁵⁴ When by statute a court of equity is given such jurisdiction under particular circumstances, it can only interfere when the case comes within the statute.⁵⁵

This doctrine has been held subject to exceptions. In a late Michigan case⁵⁶ it was said: "The general rule undoubtedly is that courts of equity have no power to wind up a corporation, in the absence of statutory authority. This rule is, however, subject to qualifications. It has been held that when it turns out that the purposes for which a corporation was formed cannot be attained it is the duty of the company to wind up its affairs; that the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders; that it is for this purpose, and no other, that the capital has been advanced; and, if circumstances have rendered it impossible to continue to carry out the purpose for which it was formed with profit to its stockholders, it is the duty of its managing agents to wind up

⁵³ *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895; *Hardon v. Newton*, 14 Blatchf. 376, Fed. Cas. No. 6,054, 1 Cumming, Cas. Priv. Corp. 487; *Hodges v. Screw Co.*, 3 R. I. 9; *Verplanck v. Insurance Co.*, 1 Edw. Ch. (N. Y.) 84; *Bayless v. Orne*, Freem. Ch. (Miss.) 161; *State v. Merchants' Insurance & Trust Co.*, 8 Humph. (Tenn.) 235; *Folger v. Insurance Co.*, 99 Mass. 274, 96 Am. Dec. 747; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Waterbury v. Express Co.*, 50 Barb. (N. Y.) 157; *Belmont v. Railway Co.*, 52 Barb. (N. Y.) 637; *Denike v. Cement Co.*, 80 N. Y. 599; *Wheeler v. Pullman Iron & S. Co.*, 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858. See *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

⁵⁴ *Folger v. Insurance Co.*, supra.

⁵⁵ *Hardon v. Newton*, supra.

⁵⁶ *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, 2 Cumming, Cas. Priv. Corp. 234.

its affairs. To continue the business of the company under such circumstances would involve both an unauthorized exercise of corporate franchises and a breach of the charter contract." And it was held that in a suit by a stockholder against the corporation, its directors, and other stockholders, for an accounting and the appointment of a receiver to wind up the affairs of the company, where it appeared that the defendants owned a majority of the stock, and had for a number of years controlled the corporation in their own interest, and for their own profit, fraudulently excluding the complainant, and paying no dividends to him, the failure to pay being due to their fraud, and not to natural causes, the court had jurisdiction to wind up the corporation, and distribute its assets. "This corporation," it was said, "has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of the majority of the stock; and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations."

At the Suit of the State.

A court of equity has no inherent jurisdiction to forfeit the charter of a corporation, or decree a dissolution, at the suit of the state. A court of equity does not administer punishment or enforce forfeitures for transgressions of law, but is limited in its jurisdiction to the protection of civil rights, and it is also limited in its jurisdiction to cases in which there is no adequate remedy at law. An information, therefore, cannot be maintained in equity in the name of the state or the attorney general to forfeit the charter of a corporation for misuse or nonuser, or to enjoin a corporation or pretended corporation from exercising unauthorized powers, unless, in the latter case, there is some peculiar ground for equitable interference; but (the only remedy is at law by quo warranto or scire facias.⁵⁷

⁵⁷ Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227, 1 Cumming, Cas. Priv. Corp. 585; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Wallace v. Pierce, 101 Iowa, 313, 70 N. W. 216, 38 L. R. A. 122, 63 Am. St. Rep. 389; Barton v. International Fraternal Alliance, 85 Md. 14, 36 Atl. 658; Attorney General v. LeGrand Roller Skating Rink Co., 143 Ill. 118, 32 N. E. 525; Attorney General v. American Tobacco Co., 55 N. J. Eq. 352.

A court of equity, however, has jurisdiction to grant relief by injunction in two cases: (1) Where the acts complained of constitute or threaten a public nuisance or injury, which affects or endangers the public safety or convenience, and requires immediate judicial interposition, like obstruction of highways and navigable rivers;⁵⁸ and (2) where there is a charitable trust, and the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in equity in behalf of the public.⁵⁹

EFFECT OF DISSOLUTION.

85. When a corporation is dissolved, it is dead, and, in the absence of a statute to the contrary, it no longer exists for any purpose. Therefore, after dissolution,

- (a) It can exercise no power, the right to exercise which depended upon its charter.**
- (b) It cannot be sued, nor can a suit previously commenced be prosecuted to judgment, nor can it sue.**
- (c) At common law.**
 - (1) Debts due to or from it were extinguished.**
 - (2) Real property undisposed of at the time of the dissolution reverted to the grantors or their heirs.**
 - (3) Personal property owned by it at the time of dissolution escheated to the state.**
- (d) But a court of equity, under its general jurisdiction to enforce and administer trusts, has jurisdiction to avoid the effect of the common law to the extent of causing the debts due a dissolved corporation to be collected, and taking control of the corporate property and distributing it, so as to protect the equitable interests of creditors and shareholders.**
- (e) In most states, if not in all, there are now statutory provisions under which the business of dissolved corporations may be liquidated and settled, and the equities of shareholders and creditors may be enforced.**

When the charter of a corporation is repealed, or the corporation is otherwise dissolved, the corporation or members can no longer exercise any powers the right to exercise which depended upon the charter. If the corporation be a bank, for instance, authorized to

36 Atl. 971; *Id.*, 56 N. J. Eq. 847, 42 Atl. 1117; *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858.

⁵⁸ *Attorney General v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, 1 Cumming, Cas. Priv. Corp. 589; *Attorney General v. Great Northern Ry. Co.*, 4 De Gex & S. 75; *Louisville & N. R. Co. v. Commonwealth*, 97 Ky. 675, 31 S. W. 476, affirmed 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; *Trust Co. v. State*, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520.

⁵⁹ *Attorney General v. Garrison*, 101 Mass. 223; *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Parker v. May*, 5 Cush. (Mass.) 336.

lend money and issue circulating notes, it cannot make new loans or issue new notes. If the corporation was chartered to operate a railroad, and authorized to use the streets of a city for that purpose, it can no longer use the streets or exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons, under the general laws of the state, is abrogated by the repeal of the law which granted these special rights.⁶⁰

When a corporation has been legally dissolved, it is no longer in existence for any purpose. It is dead. It cannot be recognized for the purpose of proceedings by or against it any more than could a dead natural person. Thus *scire facias* to revive a judgment recovered against a corporation cannot be maintained against it, and a judgment had thereon, after the corporation has been legally dissolved.⁶¹ Nor can an action be maintained against it, or an action previously commenced be prosecuted to judgment. A judgment rendered against a corporation after it has been legally dissolved is as wholly void as if it had been rendered against a dead person.⁶² Nor can an action be brought by or in the name of a corporation after its dissolution.⁶³

Chancellor Kent said: "According to the old settled law of the land, where there is no special statute provision to the contrary, upon the civil death of a corporation, all its real estate remaining unsold reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished.* Neither the stockholders nor the directors or trustees of the corporation can recover those debts, or be charged with them, in their natural capacity.

⁶⁰ *Greenwood v. Freight Co.*, 105 U. S. 18, 26 L. Ed. 961, 1 Cumming, Cas. Priv. Corp. 538, W. D. Smith, Cas. Corp. 160, Shep. Cas. Corp. 260; *Insurance Com'r. v. United Fire Ins. Co.*, 22 R. I. 377, 48 Atl. 202; *Fitts v. National Life Ass'n.*, 130 Ala. 413, 30 South. 374; *Dundee Mortgage & T. I. Co., v. Hughes* (C. C.) 77 Fed. 855.

⁶¹ *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. Ed. 945, 1 Cumming, Cas. Priv. Corp. 459.

⁶² *Thornton v. Railway Co.*, 123 Mass. 32, 1 Cumming, Cas. Priv. Corp. 462, W. D. Smith, Cas. Corp. 167, Shep. Cas. Corp. 246; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Dobson v. Simonton*, 86 N. C. 492; *Krutz v. Town Co.*, 20 Kan. 397. As to whether expiration of charter *ipso facto* amounts to a dissolution, within this rule, see ante, p. 231.

⁶³ *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 1 Cumming, Cas. Priv. Corp. 478, W. D. Smith, Cas. Corp. 165, Shep. Cas. Corp. 244; *MacRae v. Kansas City Piano Co.*, 69 Kan. 457, 77 Pac. 94.

* It has recently been held in England that a chose in action in favor of a banking corporation survived its dissolution, but passed to the crown as *bona vacantia*. *Re Higginson & Dean*, L. R. [1899] 1 Q. B. D. 325. See, also, *Re Taylor's Agreements Trusts*, [1904] 2 Ch. 787. But see *Re No. 8, Bamare Road*, [1906] 1 Ch. 539.

All the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown at common law." ⁶⁴

Such were the common-law rules,⁶⁵ but, as respects private business corporations, they are now obsolete. They were established before modern trading and commercial corporations came into existence. With the growth of such corporations, the legislatures and the courts have been obliged to abolish or change many of the common-law rules,—these among others. These rules have not been recognized in equity. While a private corporation holds the legal title to the corporate property as a distinct legal person, it holds it in equity merely for the benefit of the stockholders and of creditors. If the corporation is dissolved, and ceases to exist, the debtors of the corporation are not, in equity, released from their liability, the creditors of the corporation are not left without a remedy to recover the amount due them,[†] and the property of the corporation does not revert to the grantors, or escheat to the state, instead of belonging to the stockholders. It is true that the legal title to the property does not vest in the stockholders, but they still retain the beneficial interest therein;[‡] and, if

⁶⁴ 2 Kent, Comm. 307; Co. Litt. 13b.

⁶⁵ 1 Bl. Comm. 484; 2 Kyd, Corp. 516; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157; State Bank v. State, 1 Blackf. (Ind.) 267; Fox v. Horah, 36 N. C. 358, 36 Am. Dec. 48.

[†] Where a corporation is dissolved, however, at least if the dissolution is not voluntary, its executory contracts are discharged, and the creditor is deprived of the right to recover damages for nonperformance. *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174; *Griffith v. Backwater Boom & L. Co.*, 46 W. Va. 56, 33 S. E. 125. But see *Rosenbaum v. U. S. Credit System Co.*, 61 N. J. Law, 543, 40 Atl. 591; *Weatherly v. Capital City Water Co.*, 115 Ala. 156, 22 South. 140. Where the dissolution is voluntary, while it deprives the creditor of the power to compel specific performance, it does not deprive him of the right to recover damages out of the assets. *Schleider v. Dielman*, 44 La. Ann. 462, 10 South. 935. Cf. *Tiffin Glass Co. v. Stoebr*, 54 Ohio St. 157, 43 N. E. 279.

[‡] Where a Louisiana corporation, owing no debts and owning land in Texas, was dissolved by act of the stockholders, and certain of them were appointed commissioners in accordance with the Louisiana law to wind up the business, the instrument evidencing their appointment not being such as required in Texas for the conveyance of land, they could not as such commissioners maintain an action of trespass to try title to the land, but they could maintain such action in their character as stockholders, since on dissolution the title passed to them as tenants in common. "If a receiver or some officer of the court had been appointed to wind up the affairs of the corporation," said the court, "the legal title would have vested in such officer in trust for the creditors and the stockholders. But, there being no corporation, no receiver, trustee, nor creditor in existence, the trust ceased to exist, and the legal and equitable title united in the stockholders, the only persons who had an interest in the land." *Baldwin v. Johnson*, 95 Tex. 85, 65 S. W. 171.

the legislature has made no provision by which they can reach it, and enforce their rights, they may come into a court of equity, and obtain relief. Such a court has jurisdiction, unless it has been taken away by statute, to reach the property of the defunct corporation, to cause the debts due to it to be collected, and to distribute the assets, after payment of the creditors, to the beneficial owners, that is, to the members or stockholders.⁶⁶

There are now statutes in most states, if not in all, prescribing the mode by which the business of dissolved corporations may be liquidated and settled, and by which the equities of the creditors and members respectively may be enforced. In many states there are statutes by which corporations whose powers would expire by express limitation in their charters or otherwise are continued bodies corporate for a certain length of time from and after the day on which their powers would cease, for the purpose of prosecuting and defending suits, and of enabling them to gradually settle and close their business, and divide their capital stock, but not for the purpose of continuing business.⁶⁷ Such statutes are not invalid as impairing the obligation of contracts, nor are they invalid as being retrospective,

⁶⁶ *Bacon v. Robertson*, 18 How. (U. S.) 480, 15 L. Ed. 499, 1 Cumming, Cas. Priv. Corp. 468; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Folger v. Insurance Co.*, 99 Mass. 267, 96 Am. Dec. 747. When the charter of a corporation expires, the officers or trustees may safely distribute the assets to those who appear on the books of the company as stockholders, and need not require production of the stock certificates. "As between adverse claimants of the certificate, the possession of it, with the transfer upon it, is often the test of the title. But when the corporation itself is not dealing with its stockholder on the security of his stock, and is merely performing a corporate duty, its own record is all it needs to consult, for whoever would demand the privileges of a stockholder should produce the evidence of his title, and ask to be permitted to participate." *Bank of Commerce's Appeal*, 73 Pa. 59. The same is true of the payment of dividends. See post, p. 837. Where a corporation exists by law, after the expiration of its charter, solely for the purpose of winding up its affairs, a majority in interest of its stockholders cannot sell its property to a new corporation, of which they are directors and stockholders, at a valuation estimated by themselves, against the will of the minority, and compel such dissenting stockholders either to receive shares of stock in the new corporation in return for their old shares, or to be paid therefor on the basis of the estimated valuation of the property, and the minority may have the property publicly sold. *Mason v. Mining Co.*, 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, *Shep. Cas. Corp.* 215. Though the dissolution of a corporation defendant in a libel suit abates the action, it may be revived against the former directors as trustees of the corporation under the general corporation law for the benefit of the stockholders. *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 61 N. E. 115.

⁶⁷ *Foster v. Bank*, 16 Mass. 245, 8 Am. Dec. 135, 1 Cumming, Cas. Priv. Corp. 464.

because, as is generally the case, they are made applicable to corporations previously created, as well as to those created afterwards.⁶⁸

If a corporation, when it ceases to exist, has no members, and owes no debts, the common-law rule by which its property reverts or escheats applies. It has been held, for instance, that where a corporation which, like a mutual insurance company, has no stockholders, ceases to exist, the last policy having expired, and there no longer being any members, the common-law rule, which gives its surplus assets to the state, still applies, and the assets do not go to the former policy holders, nor to the original corporators.⁶⁹

The common-law rule still applies to public and religious or charitable corporations. This question came up before the supreme court of the United States in a late case. Congress had repealed the charter granted by the territory of Utah, to the corporation known as the Church of Jesus Christ of Latter-Day Saints, and it was held that its property reverted and escheated to the United States, and that it made no difference that all the property was held in trust for the corporation by individuals.⁷⁰ "When a business corporation," it was said, "instituted for the purposes of gain or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails, namely, that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; while its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject, as we shall hereafter see, to the charitable use." The court held that, as the real estate of the corporation was acquired by it from the United States under the town-site act, it reverted to the United States, and that its personal property also vested in the United States, to be applied, under the cy-pres doctrine, either by the court, or by the direction of congress, to some kindred object, whereby the general purposes of religion and charity may be promoted.⁷¹

⁶⁸ *Foster v. Bank*, 16 Mass. 245, 8 Am. Dec. 135, 1 Cumming, Cas. Priv. Corp. 464.

⁶⁹ *Titcomb v. Insurance Co.*, 79 Me. 315, 9 Atl. 732, 1 Cumming, Cas. Priv. Corp. 476.

⁷⁰ And see *Fox v. Horah*, 36 N. C. 358, 36 Am. Dec. 48.

⁷¹ *Late Corporation of Church of Jesus Christ v. U. S.*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481.

CHAPTER X.**MEMBERSHIP IN CORPORATIONS.**

- 86. How Membership is Acquired.
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- 127-132. Release and Discharge of Subscriber.
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HOW MEMBERSHIP IS ACQUIRED.

- 86. Membership in a corporation is acquired by contract with the corporation.**
- (a) In nonstock corporations the mode of forming the contract of membership is regulated by the charter and by-laws.
 - (b) In stock corporations membership is determined by the ownership of one or more shares of the capital stock, which may be acquired
 - (1) By subscription to the capital stock, either before or after incorporation.
 - (2) By purchase from the corporation.
 - (3) By transfer from the owner.

Membership in a corporation is always the result of contract, express or implied. A person cannot be made a member or stockholder of a corporation without his consent. Nor can he acquire membership without his consent and the consent of the corporation, as the representative of all the members. Membership, therefore, is the result of a contract between the individual and the corporation. It is

sometimes said to be the result of a contract between the corporators, but this is inaccurate. Such is the case in a partnership, but in a corporation the contract of membership is a contract with the corporators in their collective capacity; that is, with the corporation.

Membership in Nonstock Corporations.

The nature of the contract of membership, and the mode of forming it, will necessarily vary according to the nature of the corporation. In nonstock corporations the matter is regulated by the charter, or by the by-laws where the charter is silent. Usually, the charter or enabling act under which such a corporation is formed provides for the original membership necessary to constitute a corporation, and new members are taken in, after the corporation has come into existence, under the rules prescribed by the charter or by-laws. Such is the case, for instance, with mutual insurance and mutual benefit corporations, incorporated trade unions, literary societies, etc. No one can be made or become a member in such a corporation without his consent.¹ And, on the other hand, after the corporation has become organized, no one can become a member without its consent, and by compliance with its charter, and its authorized by-laws. In a late Illinois case the question arose whether the complainant was a member of the Chicago Live-Stock Exchange, a corporation organized by commission merchants engaged in buying and selling live stock for others at the stock-yards. A by-law of the corporation provided that members should be admitted upon written application, indorsed by two members, and approved by at least seven directors, and payment of an initiation fee or presentation of a certificate of membership duly transferred to the applicant. It was held that one to whom a certificate of membership had been duly transferred, but who had made no application for membership, was not a member of the corporation. The association, it was said, had an undoubted right to adopt this by-law, and, as it prescribed the mode, and the only mode, in which membership in the exchange could be acquired, no one could justly claim to be a member, who had not been admitted in the mode thus prescribed.²

¹ An act of the legislature by which "the members of" several mutual fire insurance companies are made a new corporation, and which "shall not affect the legal rights of any person," and is to take effect "when accepted by the members of said corporations," does not constitute a member of one of the old companies, who does not expressly assent to it, a member of the new corporation, although the act be duly accepted by a majority of the members of each of the old companies. *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.) 543. See, to the same effect, *Gardner v. Insurance Co.*, 33 N. Y. 421.

² *American Live-Stock Commission Co. v. Chicago Live-Stock Exch.*, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385. See *State v. Sibley*, 25 Minn. 387.

A court of equity has no power to compel a corporation to admit a person to membership against the will of those whose consent is, according to the charter, or an authorized by-law, essential to the eligibility of the applicant.³

Membership in Stock Corporations.

Membership in joint-stock corporations is determined by the ownership of shares of stock. Ownership of shares is acquired by contract with the corporation. This may be by a contract of subscription either before ⁴ or after ⁵ the corporation is organized, or by a purchase of shares from the corporation after its organization,⁶ or by a purchase and transfer of shares from one who owns them.⁷ In the latter case there is a novation of the contract of membership.⁸ The transferee, as we shall see, is substituted by the implied or express consent of the corporation to all the rights and privileges of the transferror, and generally assumes his liabilities.

"CAPITAL STOCK" AND "CAPITAL."

87. The "capital stock" of a corporation is the amount in money or property subscribed and paid in, or secured to be paid in, by the shareholders, and always remains the same unless changed by legislative authority.

88. The "capital" of a corporation includes all the property of the corporation, and may therefore be greater or less in value than the capital stock.

The terms "capital" and "capital stock," as applied to corporations, are often used by the courts and in statutes as if they were synonymous, but, strictly speaking, they are not so. They do not mean the same thing. The capital stock of a corporation is the amount in money or property subscribed and paid in, or secured to be paid in, by the shareholders, and always remains the same unless changed by legislative authority.⁹ The capital of a corporation is a broader term, and includes all the funds, securities, credits, and property, of whatever

³ Id.

⁴ Post, p. 260.

⁵ Post, p. 258.

⁶ Post, p. 259.

⁷ Post, p. 393.

⁸ 1 Mor. Corp. § 159.

⁹ Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648; State v. Morristown Fire Ass'n, 23 N. J. Law, 195; Williams v. Telegraph Co., 93 N. Y. 162, 188; Barry v. Exchange Co., 1 Sandf. Ch. (N. Y.) 280. A corporation cannot issue stock where the power to do so is not given by its charter. In an act creating certain persons a corporation for the purpose of establishing a cemetery, authority to "generally do all such other matters and things as are incident to a corporation" does not give power to issue stock. Cooke v. Marshall, 191 Pa. 315, 48 Atl. 314, 64 L. R. A. 413; Id., 196 Pa. 200, 46 Atl. 447, 64 L. R. A. 413.

kind, which the corporation possesses.¹⁰ Thus, if a banking corporation is organized with a capital stock of \$100,000, and after this is paid in it makes profits amounting to \$50,000, which it keeps instead of distributing it in the way of dividends, it has a capital of \$150,000, but its capital stock remains, as at the start, \$100,000. As was said by Chief Justice Green, capital stock, as employed in acts of incorporation, is never used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital prescribed to be contributed at the outset by the stockholders for the purposes of the corporation. The value of the corporate assets may be greatly increased by surplus profits, or be diminished by losses, but the amount of the capital stock remains the same. The funds of the company may fluctuate; its capital stock remains invariable, unless changed by legislative authority.¹¹

NATURE OF SHARES OF STOCK.

- 89. A share of stock in a corporation is the right to partake, according to the amount put into the fund representing the capital stock, of the surplus profits of the corporation, and ultimately, on its dissolution, of so much of this fund as is not liable for the debts of the corporation.**
- 90. A share of stock is in the nature of a chose in action, and it is personal property, though the corporation may own real estate.**
Thus
- (a) A sale of shares is not within that clause of the statute of frauds requiring agreements for the sale of land or an interest therein to be in writing.**
 - (b) On the death of the owner, shares are distributed as personal estate, and do not go to the heirs as real estate.**
 - (c) In most states a sale of shares, like a sale of other choses in action, is within that clause of the statute of frauds relating to agreements for the sale of "goods, wares, and merchandises."**
 - (d) Shares of stock, being intangible, and in the nature of choses in action, were not subject to execution at common law; but by statute they are now very generally made subject to execution and attachment.**

¹⁰ Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429. "The word 'capital' is unambiguous. It signifies the actual estate, whether in money or property, which is owned by an individual or a corporation. In reference to a corporation, it is the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums, or, if losses have been incurred, then it is the residue after deducting such losses." People v. Commissioners of Taxes, etc., for the City and County of New York, 23 N. Y. 192, 219.

¹¹ State v. Morristown Fire Ass'n, 23 N. J. Law, 195.

Shares of stock "are intangible, and rest in abstract legal contemplation."¹² When it is said that a person owns a certain number of shares of stock, it is meant that he has a right to share in the profits of the corporation, and in its property on dissolution, after payment of its debts, in the proportion that the number of his shares bears to the whole capital stock. A share of the capital stock is the right to partake, according to the amount put into the fund representing the capital stock, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for the debts of the corporation.¹³

Shares of stock are not a chattel interest. The holders do not own the property of the corporation.¹⁴ They are in the nature of a chose in action.¹⁵ Thus shares of stock belonging to a married woman are not personal property in possession so as to vest in her husband at common law; but, like choses in action, they must be reduced to his possession.¹⁶

The fact that the corporation owns real estate, or even that all of its property is real estate, does not make the shares of its stock real property. They are in the nature of choses in action, and are personal property.* It follows that an agreement for the sale of shares in a corporation owning real estate is not an agreement for the sale of land, or of an interest in land, so as to render writing necessary under the statute of frauds.¹⁷ So, on the death of a shareholder in a corporation, the capital stock of which is represented by real estate, his shares

¹² *Burrall v. Railroad Co.*, 75 N. Y. 211, 217.

¹³ *Burrall v. Railroad Co.*, 75 N. Y. 211, 216; *Ohio Life Insurance & Trust Co. v. Merchants' Insurance & Trust Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Fisher v. Bank*, 5 Gray (Mass.) 373, 1 Cumming, Cas. Priv. Corp. 664.

¹⁴ *Ante*, p. 5, et seq.

¹⁵ *Fisher v. Bank*, 5 Gray (Mass.) 373, 1 Cumming, Cas. Priv. Corp. 664. Shares of stock in a Michigan corporation, being by the laws of that state deemed personal property, must be so considered within the meaning of an act of congress authorizing an order to bring in absent defendants who are not inhabitants of the state or found within the district in a suit to remove an incumbrance or lien on real or personal property within the district in which the suit is brought. *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.

¹⁶ *Tiff. Pers. & Dom. Rel.* 89; *Ang. & A. Corp.* §§ 560, 561; *Slaymaker v. Bank*, 10 Pa. 373; *Arnold v. Ruggles*, 1 R. I. 165.

* *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674.

¹⁷ *Humble v. Mitchell*, 11 Adol. & E. 205, 1 Cumming, Cas. Priv. Corp. 602. And they will pass by a will not executed according to the provision of the statute of frauds relating to devises of land. *Bligh v. Brent*, 2 Younge & C. 268.

are to be distributed as personal estate, and do not go to the heirs as real property.¹⁸

It is held in England that shares of stock are not "goods, wares, or merchandise," within the meaning of the seventeenth section of the statute of frauds, and that a contract for the sale thereof to the value of more than £10 need not be in writing, as the statute is there considered as referring to corporeal movable property only, and not as including choses in action which are incapable of part delivery.¹⁹ In this country some of the courts have followed the English rule;²⁰ but in most states the construction placed upon the statute is different, and it is held to include incorporeal as well as corporeal property, and therefore to include shares of stock.²¹ In some states the statute is broader in its terms than the original statute. In New York and several other states it expressly includes choses in action, and in Florida it uses the term "personal property," and these statutes of course apply to stock in corporations.²² Shares of stock constitute property, and may be the subject of conversion.†

Execution and Attachment.

A share of stock, being in the nature of a chose in action, could not be reached by execution at common law, and it is not subject to attach-

¹⁸ Russell v. Temple (Mass.) 3 Dane, Abr. 108. It carries with it the incidents of personal property, one of which is its alienation. Herring v. Ruskin Co-op. Ass'n (Tenn. Ch.) 52 S. W. 327.

¹⁹ Humble v. Mitchell, 11 Adol. & E. 205, 1 Cumming, Cas. Priv. Corp. 602; Knight v. Barber, 16 Mees. & W. 66.

²⁰ Webb v. Railroad Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; Whittemore v. Gibbs, 24 N. H. 484; Vawter v. Griffin, 40 Ind. 593.

²¹ Tiff. Sales, 43, 44; Clark, Cont. 2d Ed., 100, 138; Tisdale v. Harris, 20 Pick. (Mass.) 9, 1 Cumming, Cas. Priv. Corp. 604; Boardman v. Cutter, 128 Mass. 388; North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Me. 430; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337; Greenwood v. Law, 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688; Hudson v. Weir, 29 Ala. 294; Green v. Brookins, 23 Mich. 48, 54, 9 Am. Rep. 74.

²² Artcher v. Zeh, 5 Hill (N. Y.) 200; Peabody v. Speyers, 56 N. Y. 230; Mayer v. Child, 47 Cal. 142; Spear v. Bach, 82 Wis. 192, 52 N. W. 97; Southern Life Insurance & Trust Co. v. Cole, 4 Fla. 359.

† Ayres v. French, 41 Conn. 142; Nabring v. Bank of Mobile, 58 Ala. 204; Kuhn v. McAllister, 1 Utah, 275; McAllister v. Kuhn, 96 U. S. 87, 24 L. Ed. 615; Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80; Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Hine v. Commercial Bank, 119 Mich. 448, 78 N. W. 471; Allen v. American Building & L. Ass'n, 49 Minn. 544, 52 N. W. 144, 32 Am. St. Rep. 574; Carpenter v. American Building & L. Ass'n, 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345. In Pennsylvania it seems that only the certificate, and not the share of stock, may be the subject of conversion. Neiler v. Kelly, 69 Pa. 407.

ment, unless expressly made so by statute.²³ In most states, however, if not in all, statutes have been enacted, making shares of stock and other choses in action subject to execution, and the statutes providing for attachment generally make shares of stock subject to that remedy. It is not necessary that the statute shall expressly mention shares of stock. If it uses terms clearly showing an intention to include such property, it will be given effect accordingly. Thus shares of stock would clearly be included under the term "choses in action."† They have been held to be included under the terms "estate,"²⁴ "rights and credits."²⁵ But there are some cases in which the statutes are more strictly construed, and in which shares of stock have been held not to be included under the phrase "real and personal property," or "estate, both real and personal."²⁶

To render a levy of execution or attachment on shares of stock and a sale thereunder valid, the provisions of the statute as to the mode of making the levy and sale, and the formalities to be observed, must be strictly observed.²⁷

²³ 1 Cook, Stock, Stockh. & Corp. Law, §§ 480-491; *Denton v. Livingston*, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264; *Blair v. Compton*, 33 Mich. 414; *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796; *Barnes v. Hall*, 55 Vt. 420; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507, 509; *Goss & P. Manuf'g Co. v. People*, 4 Ill. App. 510; *Haley v. Reid*, 16 Ga. 437; *Foster v. Potter*, 37 Mo. 525.

† *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938.

²⁴ *Chesapeake & O. R. Co. v. Paine*, 29 Grat. (Va.) 502, 505. And see *Union Nat. Bank v. Byram*, 131 Ill. 92, 22 N. E. 842. Certificates of stock in a foreign corporation, when in the hands of a third person within the state, are subject to garnishment as "property." *Puget Sound Nat. Bank v. Mather*, 60 Minn. 362, 62 N. W. 396. *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

²⁵ *Curtis v. Steever*, 36 N. J. Law, 304.

²⁶ *Haley v. Reid*, 16 Ga. 437; *Foster v. Potter*, 37 Mo. 525. But see *Union Nat. Bank v. Byram*, 131 Ill. 92, 22 N. E. 842.

²⁷ 1 Cook, Stock, Stockh. & Corp. Law, § 481; *Titcomb v. Insurance Co.*, 8 Mass. 326; *Howe v. Starkweather*, 17 Mass. 240; *Blair v. Compton*, 33 Mich. 414; *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; *Voorhis v. Terhune*, 50 N. J. Law, 147, 13 Atl. 391, 7 Am. St. Rep. 781; *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 20 S. W. 691, 35 Am. St. Rep. 691; *Moore v. Opera-House Co.*, 81 Iowa, 45, 46 N. W. 750; *Commercial Nat. Bank v. Farmers' & Traders' Nat. Bank*, 82 Iowa, 192, 47 N. W. 1080; *Keating v. Stock Co.*, 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670; *McNaughton v. McLean*, 73 Mich. 250, 41 N. W. 267; *Goss & P. Manuf'g Co. v. People*, 4 Ill. App. 510; *People v. Goss & Phillips Manuf'g Co.*, 99 Ill. 355; *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596; *Wells v. Price*, 6 Idaho, 490, 56 Pac. 266.

The situs of shares of stock for most purposes is in the state by which the corporation was created, and they can be levied upon in that state only.²⁸

CERTIFICATES OF STOCK.

91. A certificate of stock is simply a written acknowledgment by the corporation of the interest of the holder in its property and franchises.

Shares in the capital stock of a corporation are usually represented by certificates issued by the corporation to the stockholders, stating that the holder is the owner of a certain number of shares, and generally prescribing the mode in which they may be transferred, as on the books of the company in person or by attorney, and on surrender of the certificate. A stock certificate is merely evidence of the stockholder's rights. "The issuing of the original certificates is in no sense a transfer of stock. The interest of the parties to whom they are issued is the same before as after such issue. The certificate is simply a written acknowledgment by the company of the interest of the subscribers in its property and franchises."²⁹ A certificate of stock is not a security, much less a negotiable instrument.³⁰ It is not necessary to constitute a subscriber a stockholder.³¹

SUBSCRIPTIONS TO STOCK—SUBSCRIPTIONS AFTER INCORPORATION.

92. A subscription to the stock of an existing corporation, when accepted, is a contract between the subscriber and the corporation, and is subject to the rules governing other kinds of contracts.

When a corporation is already organized, a subscription to its capital stock is like any other contract with the corporation. It is a contract between the corporation and the subscriber, and is subject to the principles governing the formation of other contracts. There must be an

²⁸ 1 Cook, Stock, Stockh. & Corp. Law, § 485; Plimpton v. Bigelow, 93 N. Y. 592; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 691, 35 Am. St. Rep. 691; New Jersey Sheep & W. Co. v. Traders' Deposit Bank, 104 Ky. 90, 46 S. W. 677; Fahrig v. Milwaukee & O. Breweries, 113 Ill. App. 525; Puget Sound Nat. Bank v. Mather, 60 Minn. 362, 62 N. W. 396. But see Young v. Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

²⁹ Burr v. Wilcox, 22 N. Y. 551, 557; Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461; Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938.

³⁰ Post, p. 415.

³¹ Post, p. 307.

offer by one party and acceptance by the other, resulting in mutual agreement. If the corporation opens subscription books or solicits subscriptions, and a person subscribes for shares, he makes an offer to the corporation; and when the subscription or offer is accepted by the corporation, it becomes binding. Or the solicitation of subscriptions may be a general offer by the corporation, and a subscription in accordance with the offer would be an acceptance, and result in a contract without further assent on the part of the corporation.⁸² In these cases there is a contract between the subscriber and the corporation, which ipso facto makes the subscriber a shareholder, and binds him to pay the amount of the subscription.⁸³

There must also be a consideration for the promise of the subscriber and for the undertaking of the corporation to recognize him as a stockholder. The consideration for the latter is the subscriber's promise to pay for his stock, and the consideration for the former is the acquisition by the subscriber of an interest in the franchises and property of the corporation and the right to share in the profits.⁸⁴ It follows that the obligation must be mutual. "A stock subscription is a transaction between the subscriber and the company, and the obligation of one can only be sustained by the corresponding obligation of the other. If both are not bound, neither is bound, and the transaction is a nullity."⁸⁵

Distinguished from a Sale of Shares.

A subscription to the capital stock of a corporation after its organization must be distinguished from a sale of shares by it.* A purchase of shares, if fully executed, will make the purchaser a stockholder, but it does not make him a subscriber; and the rules governing subscriptions and sales of shares are different. Thus, as we shall see, in the case of a subscription, failure of the corporation to issue or tender a certi-

⁸² Greer v. Railway Co., 96 Pa. 391, 42 Am. Rep. 548. In this case plaintiff opened books for subscriptions, placing one of them in the defendant's hands for solicitation of subscriptions. Defendant entered his own name on the book as a subscriber, and kept the book for six months without attempting to withdraw his name. He then cut his name out, and returned the book to plaintiff. He claimed that he had a right to withdraw at any time before he returned the book, but it was held that the contract of subscription was binding upon him, because the company, in soliciting subscriptions, "made a continuing offer, which became an agreement with each acceptant for the number of shares for which he subscribed."

⁸³ Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499, 506; Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317, W. D. Smith, Cas. Corp. 44; McClure v. Railway Co., 90 Pa. 269.

⁸⁴ Post, p. 263.

⁸⁵ Per Campbell, J., in Carlisle v. Railroad Co., 27 Mich. 315, 318.

* Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149.

ificate of stock, which is merely evidence of the ownership of shares, does not prevent the subscriber from becoming a shareholder, with all the rights and subject to all the liabilities of shareholders, unless there is a stipulation to that effect in the subscription.⁸⁶ On a sale of stock, however, the rule is different. Such a sale stands on the same footing as a sale of any other property, and tender of the certificate is a condition precedent to the right to maintain an action for the price.⁸⁷

SAME—SUBSCRIPTIONS PRIOR TO INCORPORATION.

- 93. A preliminary agreement by a number of persons to form a corporation and take stock therein is not a contract by the subscribers with each other, and cannot be enforced by one or more against any other, but is enforceable only by the corporation when formed.**
- 94. Such an agreement, if not made as a step authorized by statute in the process of forming the corporation, is a mere continuing offer to the corporation by each subscriber, and may be revoked, or will lapse on the subscriber's death or insanity at any time before the corporation is organized. But the organization of the corporation before revocation or lapse operates as an acceptance of the offer, and the subscriptions then become binding and irrevocable, and may be enforced by the corporation.**
- 95. Such an agreement, if made as a step authorized by statute in the process of forming the corporation, is valid by virtue of the statute, though there is no consideration or mutuality prior to the organization of the corporation, and is binding on each subscriber from the time of signing, and is irrevocable thereafter; but it can be enforced only by the corporation.**
- 96. An agreement to pay money to trustees to be by them paid to a corporation thereafter to be created, the trustees to return to the subscribers stock in the corporation, is a valid contract between the subscribers and the trustees.⁸⁸**
- 97. Some of the courts make a distinction between a present subscription to the stock of a corporation to be formed and an agreement to subscribe at a future time. According to these cases, the former renders the party a stockholder, and liable on his subscription, when the corporation is organized; but the latter merely renders him liable to an action for damages on failure to take stock, the measure of damages being the difference between the market and par value of the stock.**

⁸⁶ Post, p. 307; *Marson v. Delther*, 49 Minn. 423, 52 N. W. 38.

⁸⁷ Post, p. 307; *Marson v. Delther*, supra; *Clark v. Improvement Co.*, 57 Ind. 135. And see *Thrasher v. Railroad Co.*, 25 Ill. 393; *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439; *Weiss v. Iron Co.*, 58 Pa. 295.

⁸⁸ The above propositions are taken in substance from Prof. Collin's syllabus for his class on Corporations in the Cornell University Law School.

The usual method of subscribing to the stock of a corporation which it is proposed to organize is for the parties to sign an agreement to form the corporation, and take stock in it when formed. Sometimes, but not always, they in terms promise to pay the amount of their subscriptions to the corporation. The better opinion is that such an agreement, at least in so far as the promises to subscribe are concerned, is not a contract by the subscribers with each other, and cannot be enforced by one or more of them against any other.

Common-law Subscriptions.

If the agreement is not made as a step authorized by statute in the process of forming the corporation, but depends upon the common law, it is a mere offer by each subscriber to the corporation not yet in existence to take stock, and thereby become a shareholder; and when the corporation is organized and accepts the offer, there is a binding contract of subscription between the corporation and the subscriber, by virtue of which, ipso facto, the subscriber becomes a shareholder, with all the rights and privileges, and subject to all the liabilities, of a shareholder, and the subscription may be enforced by the corporation.⁸⁹ Before the corporation is formed, the subscriptions, as we shall see, are not binding, for there is no consideration or mutuality; and, besides this, the other party to the contract is not yet in existence. But the formation of the corporation and acceptance of the subscriptions supplies the element of consideration and the other party, and renders them binding.

⁸⁹ Athol Music Hall Co. v. Carey, 116 Mass. 471; Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Richellen Hotel Co. v. International Military Enc. Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234, W. D. Smith, Cas. Corp. 48, Shep. Cas. Corp. 16; Tonica & P. R. Co. v. McNeely, 21 Ill. 71; Marysville Electric Light & Power Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215; Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336; Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294; Instone v. Bridge Co., 2 Bibb (Ky.) 576, 5 Am. Dec. 638; Bullock v. Turnpike Co., 85 Ky. 184, 3 S. W. 129; Gleaves v. Turnpike Co., 1 Sneed (Tenn.) 491; Chaffin v. Cummings, 37 Me. 76, 83; Schaeffer v. Insurance Co., 46 Mo. 248; Red Wing Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. 827; Taggart v. Railroad Co., 24 Md. 563, 89 Am. Dec. 760; Hughes v. Manufacturing Co., 34 Md. 316, 326; Low v. Railroad Co., 45 N. H. 370; Ashuelot Boot & Shoe Co. v. Holt, 56 N. H. 548, 556; McNaught v. Fisher, 96 Fed. 168, 37 C. C. A. 438. Where the payment of a bonus tax was required as a prerequisite to incorporation, a corporation which had not paid such tax had no power to accept a subscription, and the offer to subscribe was not binding on the subscriber. Cleveland v. Mullin, 96 Md. 598, 54 Atl. 665. The subscription cannot be enforced in the absence of a de jure organization. Williams v. Enterprise Co., 153 Ind. 496, 55 N. E. 425; Williams v. Citizens' Enterprise Co., 25 Ind. App. 351, 57 N. E. 581; ante, p. 92, note 43.

In *Strasburg R. Co. v. Echternacht*⁴⁰ it was held by the supreme court of Pennsylvania that such a subscription could not result in a contract between the subscriber and the corporation when formed, so as to entitle the corporation to maintain an action on it, since it was thought that the nonexistence of the corporation at the time of signing the subscription rendered the formation of a contract with it in this way impossible. This decision, if it has not been in effect overruled by later decisions of the Pennsylvania court,⁴¹ is in conflict with the decisions in almost all of the other states. It is not at all necessary, as was assumed in the case referred to, that a contract shall result, if at all, at the time the offer or proposal is made. A continuing offer may be made, and a contract will result when it is subsequently accepted according to its terms. Nor is it necessary that an offer, to result in a contract, shall be made to an ascertained person.⁴² Therefore, while it is true that a subscription to the capital stock of a corporation not yet formed is not, and cannot be, a contract with the corporation at the moment the subscription paper is signed, the corporation not being then in existence, this does not prevent its resulting in a contract at a subsequent time. It is a continuing offer or proposal on the part of the subscriber to take shares in the corporation when formed, and, by the weight of authority,⁴³ to pay the amount of the subscription; and when the corporation is organized as contemplated, before the offer is withdrawn, and accepts the subscription, it then becomes a binding contract between the subscriber and the corporation.

In *Athol Music Hall Co. v. Carey*⁴⁴ the defendant and others signed a written agreement by which, in terms, they severally promised and agreed to and with each other that they would associate themselves into a corporation, and pay to the treasurer of the corporation the amount of the several shares set against their respective names; and it was held that the corporation, when it was organized and accepted the promises, could maintain an action against the subscribers on the agreement. "In agreements of this nature," it was said, "entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, 'to and with each other,' is not a contract capable

⁴⁰ 21 Pa. 220, 60 Am. Dec. 49.

⁴¹ See *Edinboro Academy v. Robinson*, 37 Pa. 210, 78 Am. Dec. 421; *Hedge's & Horn's Appeal*, 63 Pa. 273; *McClure v. Railway Co.*, 90 Pa. 269; *Shober's Adm'rs v. Lancaster Co. Park Ass'n*, 68 Pa. St. 429; *Steamship Co. v. Murphy*, 6 Phila. (Pa.) 224.

⁴² See *Anson*, Cont. 31; *Clark*, Cont. (2d Ed.) 38.

⁴³ *Post*, p. 308.

⁴⁴ 116 Mass. 471.

of being enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case, to wit, as a contract with the common representative of the several associates."⁴⁵

Some of the courts regard an agreement by a number of persons to subscribe for stock in a corporation to be formed as a contract between the parties for the benefit of the corporation when formed, and allow the corporation to maintain an action thereon as upon a contract made for its benefit.⁴⁶ This view, however, could not be sustained in those jurisdictions where, as at common law, a person for whose benefit a contract is made, but who is not a party to it, cannot maintain an action thereon.

Consideration for Subscription.

At common law a consideration is just as essential to a contract of subscription, and to the express or implied promise of the subscriber to pay the same, as in the case of any other kind of contract. It might be rendered unnecessary in the case of an existing corporation by subscribing under seal in those jurisdictions where a seal dispenses with the necessity for a consideration.⁴⁷ And, as will be presently seen, the legislature, in providing for subscriptions preliminary to the organization of a corporation, may expressly or impliedly make them binding without a consideration.⁴⁸ Except in these cases, a subscription is not binding unless there is a sufficient consideration. In the case of subscriptions to stock a consideration arises from the benefit received by the subscriber in acquiring an interest in the corporate franchises and property, and a right to share in the profits, or, as it has been otherwise expressed, there is a consideration in the title which the subscriber acquires to shares.⁴⁹

⁴⁵ And see the other cases cited in note 39, *supra*.

⁴⁶ See *Marysville Electric Light & Power Co. v. Johnson*, 93 Cal. 538, 26 Pac. 126, 27 Am. St. Rep. 215; *International Fair & Exp. Ass'n v. Walker*, 83 Mich. 386, 47 N. W. 338.

⁴⁷ *Hudson Real-Estate Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434.

⁴⁸ *Post*, p. 267.

⁴⁹ *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317, W. D. Smith, Cas. Corp. 44; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Worcester*

It follows that a subscription, to be binding on the subscriber, must be binding on the corporation, so that it is bound to recognize the subscriber as a shareholder. In *Fanning v. Insurance Co.*⁵⁰ the defendant, prior to the organization of the plaintiff corporation, orally promised to take shares of stock, and gave her note to pay therefor, and the plaintiff brought an action on the note after its organization. The court held that the verbal subscription was not sufficient to make the defendant a shareholder, and that, therefore, there was no consideration for her promise.

It has been said that there is a consideration for a subscription in the corresponding promises of the other subscribers,⁵¹ but this is not true. It is not a case of mutual promises, where the promise of one party forms the consideration for the promise of the other. The promises are all to the corporation. Each is, as we have seen, an offer to the corporation until it is organized and accepts it. Then it becomes a promise to it, not to the other subscribers. One subscriber is not liable to an action by the others on his subscription.

Revocation or Lapse of Subscription.

As we have just seen, in the case of subscriptions, or rather offers to subscribe, to the stock of a proposed corporation, until the corporation is organized and accepts the subscription, it is not binding at common law, for the reason, among others, that until then there is no consideration for it. There is no mutuality. Until the corporation is bound to recognize the subscriber as a shareholder, he receives no consideration for his subscription. It follows, necessarily, from this that the offer to subscribe may be revoked or withdrawn by the subscriber at any time before the corporation is organized and accepts it, or before organization if that alone constitutes acceptance so as to make the subscriber a shareholder.⁵²

ter Turnpike Corp. v. Willard, 5 Mass. 80, 4 Am. Dec. 38; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Griswold v. Trustees*, 26 Ill. 41, 79 Am. Dec. 361; *Gleaves v. Turnpike Co.*, 1 Sneed (Tenn.) 491; *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed (Tenn.) 567; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

⁵⁰ 37 Ohio St. 339, 41 Am. Rep. 517.

⁵¹ *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Tonica & P. R. Co. v. McNeely*, 21 Ill. 71; *Carlisle v. Railroad Co.*, 27 Mich. 315.

⁵² *Hudson Real-Estate Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434; *Id.*, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379, *W. D. Smith, Cas. Corp.* 43, *Shep. Cas. Corp.* 23; *Wallace v. Townsend*, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829; *Muncy Traction Engine Co. v. De La Green*, 143 Pa. 269, 13 Atl. 747; *Auburn Bolt & Nut Works v. Shultz*, 143 Pa. 256, 22 Atl. 904; *Lewis v. Mill Co.* (Tex. Civ. App.) 23 S. W. 338; *Patty v. Mill Co.*, 4 Tex. Civ. App. 224, 23 S. W. 336; *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, 49

It also follows that the offer to subscribe will be revoked or lapse if the subscriber dies or becomes insane before the corporation is organized and accepts it, for the continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition, and this can no more be done by a dead or insane man than a contract can, in the first instance, be made by a dead or insane man.⁵³

Not only is such an offer revocable because of the want of consideration, but it is revocable for the further reason that until the corporation is organized there cannot, in the nature of things, be any contract, since one of the parties—the corporation—is not yet in existence. The right to revoke exists, therefore, where the subscription is under seal.⁵⁴

In order that withdrawal of a subscription may be effectual, it is necessary, as in the case of other contracts, that notice thereof shall be communicated. An uncommunicated revocation can have no effect whatever. It is not necessary that the notice of revocation be given to all the other subscribers, nor at a meeting of subscribers. It is sufficient if it be given to the person or persons to whom the subscription was given, or to the person or persons who have been chosen to represent the subscribers in forming the corporation.⁵⁵ It was

N. W. 562; *Bryant's Pond Steam-Mill Co. v. Felt*, 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. Rep. 323.

⁵³ *Pratt v. Trustees*, 93 Ill. 475, 34 Am. Rep. 187; *Beach v. First Methodist Episcopal Church*, 96 Ill. 177; *Phipps v. Jones*, 20 Pa. 260, 59 Am. Dec. 708; *Wallace v. Townsend*, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829.

⁵⁴ "Until the organization of the corporation, the subscription is a mere proposition or offer, which may be withdrawn, like any other unaccepted offer. Unless the signer is bound upon a contract, he is not bound at all. It is open to him to withdraw. It is not on the ground that there was no sufficient consideration. The seal would do away with any doubt on that score. But it is on the ground that for the time being, and until the corporation is organized, the writing does not take effect as a contract, because the contemplated party to the contract, on the other side, is not yet in existence, and for this reason, there being no contract, the whole undertaking is inchoate and incomplete, and since there is no contract, the party may withdraw." *Hudson Real-Estate Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434; *Id.*, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379, W. D. Smith, Cas. Corp. 45; *Shep. Cas. Corp.* 23.

⁵⁵ *Hudson Real-Estate Co. v. Tower*, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379, W. D. Smith, Cas. Corp. 45, *Shep. Cas. Corp.* 23. In *Hudson Real-Estate Co. v. Tower*, *supra*, the defendants subscribed under seal for stock in a corporation. Afterwards articles of incorporation were executed, and officers elected; but, before the incorporation was complete, the defendants orally informed the president that, if a certain change in the policy was made, they would no longer be associates, and would not pay their subscriptions.

held in an early English case that all the other subscribers must not only have notice, but must consent, before one of the subscribers can withdraw;⁵⁶ but now, in England as well as in this country, such consent is unnecessary. If all the other subscribers should object, it would nevertheless be the right of a subscriber to withdraw before the corporation is formed.⁵⁷

Since, upon organization of the corporation and acceptance of subscriptions, they are changed into binding contracts, a subscriber cannot afterwards withdraw without the consent of the corporation and of all the other subscribers; nor will his subscription be affected by his death or insanity after that time.⁵⁸

The supreme court of Minnesota has held in a late case as follows: "A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: First. It is a contract between the subscribers themselves to become stockholders without further act on their part immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription (at least in the absence of fraud or mistake), unless canceled by consent of all the subscribers before acceptance by the corporation. Second. It is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation." And it was further held that the promoter of a proposed corporation, who solicits and procures subscriptions, is the agent of the body of subscribers to hold the subscriptions until the corporation is formed, and then turn them over to it without any further act of delivery on the part of the subscribers; and hence, that a delivery of a subscription to such promoter is a complete delivery, so that it becomes *eo instanti* a binding contract as between the subscribers.⁵⁹ This decision is sound in so far as it holds that the subscriptions are continuing offers to the proposed corporation, and become binding when it is organized and accepts them; but it is opposed to the weight of authority in so far as it holds that an agreement by a number of persons to subscribe to the stock of a pro-

The change of policy was made, and it was held that was a sufficient withdrawal by the defendants, and notice thereof.

⁵⁶ *Kildwelly Canal Co. v. Raby*, 2 Price, 93.

⁵⁷ *Hudson Real-Estate Co. v. Tower*, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379, W. D. Smith, Cas. Corp. 45, Shep. Cas. Corp. 23.

⁵⁸ *Richelleu Hotel Co. v. International Military Enc. Co.*, 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234, W. D. Smith, Cas. Corp. 48, Shep. Cas. Corp. 16; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; post, p. 318.

⁵⁹ *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701.

posed corporation is a contract between the subscribers, and binding upon them, so as to be irrevocable before the corporation is organized. The authorities cited by the court do not sustain this view.

Subscriptions under Statutes.

Thus far we have been speaking of those agreements to form a corporation and subscribe for stock that depend upon common-law principles only, and that are not made as a step authorized by statute in the process of forming the corporation. Such an agreement made as a step authorized by statute in the process of forming the corporation stands upon a somewhat different ground. Like the agreements of which we have been speaking, it can only be enforced by the corporation after its organization; but it is binding on each subscriber, by virtue of the statute, from the time of signing, and he cannot revoke his subscription before the corporation is completely organized. In *Buffalo & New York Railroad Co. v. Dudley*⁶⁰ a railroad company had been organized under a statute which appointed commissioners to open books and receive subscriptions to its capital stock. The defendant, among others, subscribed on the books, and otherwise complied with the statute. The corporation was completely organized, and accepted the subscriptions before the defendant attempted to withdraw his, and therefore his subscription could be sustained as a continuing offer accepted by the corporation, and thereby changed into a binding promise supported by a sufficient consideration; but the court went further than this, and said that no consideration or mutuality was necessary, and that the subscription could not have been revoked even before the corporation was organized. "The rules of the common law," it was said, "in regard to consideration and mutuality, do not apply to the case. Those rules may, I think, be regarded as superseded by the statute, which not only expressly authorizes subscriptions to be made in anticipation of the existence of the corporation, but impliedly, at least, recognizes their validity. Section 4 of the act by which the plaintiffs are incorporated provides, among other things, as follows: 'And the said commissioners shall, at the time of any subscription, require the payment to them, by the person or persons subscribing, of five dollars towards and upon every hundred dollars so subscribed, and unless the same shall be paid, the subscription shall be invalid.' This plainly implies that, if the required payment is made, the subscription shall be valid. But even without this clause it would, I think, be held that a statute which authorizes subscriptions in view of a subsequent incorporation, and regulates the manner in which they shall be made, must necessarily have the effect to

⁶⁰ 14 N. Y. 836.

give validity to such subscriptions, if made in accordance with the requirements of the act." The same principle applies where the statute provides for subscriptions by signing formal articles of association, which are to be filed as required by the statute, or formal subscription papers. One who subscribes for stock by signing such articles or papers in compliance with the statute cannot revoke his subscription before the incorporation is perfected.⁶¹

Agreements to Pay Subscription to Trustees for Corporation when Formed.

"An agreement to pay money to trustees, to be by them paid to a corporation thereafter to be created, the trustees to return to the subscribers stock in the corporation accordingly, is a valid contract between the subscribers and the trustees."⁶² In *West v. Crawford*⁶³ the defendant and others entered into an agreement to form a corporation, and to take a certain number of shares of the stock, and expressly promised to pay a certain percentage of the par value thereof to one West within five days after filing of the articles of incorporation, and they constituted the said West their agent to collect the amount which might become due from them. It was held that West could maintain an action against them on their express promise as trustee of an express trust; and in a later case,⁶⁴ the corporation having been formed, and the money having been collected by West, it was held that the corporation could maintain an action against him for the same as money received by him to its use. It was held that the fact that the defendants did not sign the articles of incorporation, or otherwise comply with the statute under which the corporation was formed, and did not, therefore, become members of the corporation, was immaterial, as their liability to West was based on their express promise to pay the money to him for the use of the corporation. The agreement was sustained on the ground that the promise of the parties were mutual, and each was a consideration for the others.⁶⁵

Distinction between Present Subscription and Agreement to Subscribe.

Some of the courts make a distinction between a present subscription to the stock of a projected corporation and a mere agreement to

⁶¹ *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Johnson v. Wabash & Mt. Vernon Plank-Road Co.*, 16 Ind. 389; *Coppage v. Hutton*, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

⁶² Prof. Collin's Syllabus, Cornell Univ. Law School.

⁶³ 80 Cal. 19, 21 Pac. 1123.

⁶⁴ *San Joaquin Land & Water Co. v. West*, 94 Cal. 399, 29 Pac. 785.

⁶⁵ And see *Hecla Consolidated Gold Min. Co. v. O'Neill*, 65 Hun, 619, 19 N. Y. Supp. 592.

subscribe, and the distinction has been recognized and approved by Mr. Morawetz and other writers on the law of corporations. The former, it is held, makes the parties stockholders, and renders them liable to the corporation on their promises, when it is organized. But the latter, it is held, is not a subscription or offer to the future corporation, but merely an agreement between the parties that they will subscribe at some future time; and until they do actually subscribe upon the books, or in some other formal way, no binding contract of subscription with the corporation can result.⁶⁶ In *Thrasher v. Pike County R. Co.*⁶⁷ the defendant and others signed a paper as follows: "We, the undersigned, agree to subscribe to the stock of the Pike County Railroad the sums set against our names, when the books may be opened for subscriptions." The corporation brought an action on this agreement, counting upon the agreement as a promise to subscribe, and alleging a failure to subscribe as a breach, and plaintiff claimed to recover the par value of the shares for which the defendant agreed to subscribe, or the amount of calls made upon the stock. It was held that it could not recover on such a cause of action, as the promise set up in the declaration was merely an agreement to subscribe when subscription books should be opened, and did not make the defendant a stockholder, so as to be liable to calls. The promise was regarded as like an agreement to purchase property, rendering him liable only for the actual loss sustained by plaintiff by reason of his failure to take the stock.⁶⁸

⁶⁶ 1 Mor. Corp. §§ 46, 49.

⁶⁷ 25 Ill. 393.

⁶⁸ See, also, *Stowe v. Flagg*, 72 Ill. 397, 402; *Quick v. Lemon*, 105 Ill. 578, 585. In *Mt. Sterling Coal-Road Co. v. Little*, 14 Bush (Ky.) 429, the defendant signed the following writing: "The undersigned propose to subscribe for the number of shares, of \$50 each, to the capital stock of the Mt. Sterling Coal-Road Company, when the charter shall have been obtained and the company organized," etc. It was held, following *Thrasher v. Pike County R. Co.*, *supra*, that this was not a subscription, but an agreement to subscribe, for breach of which the plaintiff could only recover as damages the difference between the market and par value of the stock. In *Rhey v. Plank-Road Co.*, 27 Pa. 261, the defendant, to induce the plaintiff to locate its road along a certain route, signed an agreement that, if it should do so, one O'Neil "will subscribe \$500 additional stock, for which I hold myself personally responsible." The road having been located, the plaintiff sued defendant for breach of the contract. It was held that it could not recover the par value of the stock, but only the damages resulting from failure to take the stock, the measure of which was the difference between the par value and the actual value of the stock. In *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219, the defendant and others signed the following instrument: "We, the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad, to the amount set opposite our names, respectively, on condition said road be located and built through, or north of, the village of Unionville." It

It is very doubtful whether this distinction is sound. Prof. Collin says that it is unsound, and disappears as mere dicta upon a thorough sifting of the cases.⁶⁹ Every agreement to subscribe to the stock of a corporation to be organized, unless there is a failure to comply with statutory requirements, should be held a continuing offer to the corporation, resulting in a binding contract of subscription when the corporation is organized as contemplated.⁷⁰

SAME-WHO MAY BECOME SUBSCRIBERS.

98. Any person who is capable of contracting may subscribe for stock in a corporation, in the absence of express restrictions in the charter or act under which the corporation is organized.

The charter or act under which a corporation is organized may require the subscribers to its stock to be residents of the state or of the United States, or impose other restrictions.* But, in the absence of such restrictions, any person who is capable of entering into a binding contract may become a subscriber. It makes no difference that he is a nonresident of the state, or an alien.⁷¹

An infant may subscribe for shares in a corporation, but he may repudiate the contract either before or after attaining his majority, provided, in the latter case, he has not ratified it before electing to disaffirm.⁷² If he elects to disaffirm, he must do so within a reasonable time after his majority, and before accepting benefits under the contract after majority, or he will be held to have ratified the contract, and will be liable for calls.⁷³ As we shall see, where the statute under which a corporation is formed requires that a certain amount of stock shall be subscribed before organization, there must be uncon-

was held that this was not a subscription, but a mere agreement between the signers, to which the corporation was not a party, and upon which it could not maintain an action.

⁶⁹ Syllabus for Class in Corporations in Cornell University Law School.

⁷⁰ See *Bullock v. Railroad Co.*, 85 Ky. 184, 3 S. W. 129, qualifying *Mt. Sterling Coal-Road Co. v. Little*, supra.

* A state has the right to debar aliens from holding stock in its corporations. *State v. Travellers' Ins. Co.*, 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138. A restriction of membership by the charter to Norwegians and residents of M. or vicinity was valid. *Blien v. Rand*, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618.

⁷¹ *Com. v. Hemmingway*, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

⁷² *Tiff. Pers. & Dom. Rel.* 376; *London & N. W. Ry. Co. v. M'Michael*, 20 Law J. Exch. 97; *Ebbett's Case*, 5 Ch. App. 302; *Lumsden's Case*, 4 Ch. App. 31. Cf. *Foster v. Chase* (C. C.) 75 Fed. 797.

⁷³ *Tiff. Pers. & Dom. Rel.* 376; *Clark, Cont.* 241; *Lumsden's Case*, supra; *Ebbett's Case*, supra; *Cork & B. Ry. Co. v. Cazenove*, 10 Q. B. 935; *Mitchell's Case*, L. R. 9 Eq. 363; *Dublin & W. Ry. Co. v. Black*, 8 Exch. 181.

ditional and binding subscriptions to that amount, and subscriptions by infants cannot be counted.⁷⁴

Persons non compotes mentis, whether their incapacity is the result of insanity, idiocy, senile dementia, or drunkenness, may avoid their stock subscriptions to the same extent, and subject to the same qualifications, as in the case of any other contract.

Where the common law in regard to the contractual capacity of married women still obtains, a subscription by a married woman is absolutely void.⁷⁵ In some states, by statute, a married woman may contract to the same extent as a feme sole, and in such a case she may bind herself by a stock subscription. In other states her incapacity has only been partially removed. Whether she can subscribe for stock in these states must depend upon the particular statute, and the extent to which it has removed her common law disabilities.⁷⁶ Independently of any statute, a married woman may take shares by purchase, gift, or bequest, and hold the same, just as she may take and hold any other chose in action.⁷⁷ And in such a case she will incur statutory liability as a stockholder.⁷⁸ She is not prohibited from purchasing stock by a statute providing that married women shall not be capable of making any contract to affect their real or personal estate, without the written consent of her husband, as the statute applies to executory contracts only.⁷⁹

We have seen in a former chapter that by the weight of authority in this country a corporation cannot purchase or subscribe for stock in another corporation. This is not because a corporation is incapable of making such a contract, but because it is generally not within the purposes for which it was created, and is, therefore, ultra vires. A corporation may be authorized by its charter to hold stock in other corporations.⁸⁰

A corporation cannot, in its own name, or in the name of others as trustees for it, subscribe for shares of its own stock.⁸¹

Municipal corporations are often expressly authorized to subscribe for stock in railroad corporations for the purpose of aiding them; but

⁷⁴ Post, p. 299.

⁷⁵ 1 Cook, Stock, Stockh. & Corp. Law, § 66; National Commercial Bank v. McDonnell, 92 Ala. 387, 9 South. 149; Pugh and Sharman's Case, L. R. 13 Eq. 566.

⁷⁶ That she may bind her separate estate by subscription, under the married woman's acts, see 1 Cook, Stock, Stockh. & Corp. Law, § 66.

⁷⁷ Porter v. Bank of Rutland, 19 Vt. 410; Robinson v. Turrentine (C. C.) 59 Fed. 554; Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531.

⁷⁸ Robinson v. Turrentine, supra.

⁷⁹ Post, p. 570.

⁸⁰ Ante, p. 145.

⁸¹ 1 Cook, Stock, Stockh. & Corp. Law, § 64; Holladay v. Elliott, 8 Or. 85; Allibone v. Hager, 46 Pa. 48.

they have no implied authority to subscribe for stock in any corporation.⁸²

There is nothing to prevent the directors and other officers and agents of a corporation from subscribing for its stock, if there is no fraud.⁸³

SAME—FORM OF SUBSCRIPTION—STATUTORY FORMALITIES.

99. At common law no formalities are necessary to a contract of subscription. By the better opinion it may be entered into verbally. But, where the statute or charter prescribes particular formalities, they must generally be followed.

At Common Law.

At common law no particular form is necessary to the validity of a contract of subscription, but all that is necessary is that an intention shall appear on the part of the subscriber to take stock and on the part of the corporation to recognize him as a stockholder. If such an intention appears, the fact that the writing is informal can make no difference.⁸⁴ The term "subscription" etymologically signifies writing; and some of the courts have held that writing is necessary to a valid contract of subscription.⁸⁵ By the better opinion, however, at common law, writing is not at all necessary. A contract of subscription, like other contracts, may be entered into verbally unless writing is required by the charter or by some statute.⁸⁶ Such a contract is not within the statute of frauds.⁸⁷

⁸² 1 Cook, Stock, Stockh. & Corp. Law, §§ 90-103.

⁸³ 1 Cook, Stock, Stockh. & Corp. Law, § 65; *Walker v. Devereaux*, 4 Palge (N. Y.) 229; *Sims v. Railroad Co.*, 37 Ohio St. 556.

⁸⁴ *Nulton v. Clayton*, 54 Iowa, 425, 6 N. W. 685, 37 Am. Rep. 213; *Anderson v. Scott*, 70 N. H. 534, 49 Atl. 568; *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461; *Dupee v. Chicago Horse-Shoe Co.*, 117 Fed. 40, 54 C. O. A. 426. A subscription is not rendered invalid by a mistake in the name of the corporation, but the contract will operate in favor of the corporation for whose benefit it was intended. *Milford & C. Turnpike Co. v. Brush*, 10 Ohio, 111, 36 Am. Dec. 78.

⁸⁵ *Fanning v. Insurance Co.*, 37 Ohio St. 339, 41 Am. Rep. 517. In *Vreeland v. Stone Co.*, 29 N. J. Eq. 188, the court, in holding a verbal contract of subscription invalid, expressly bases the decision on the ground that the charter required writing.

⁸⁶ 1 Cook, Stock, Stockh. & Corp. Law, § 52; 1 Mor. Priv. Corp. § 54; *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440, W. D. Smith, Cas. Corp. 42, and *Shep. Cas. Corp.* 21; *Colfax Hotel Co. v. Lyon*, 69 Iowa, 683, 29 N. W. 780; *Bullock v. Turnpike Co.*, 85 Ky. 184, 3 S. W. 129; *Webb v. Railroad Co.*, 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; *Wemple v. Railroad Co.*, 120 Ill. 196, 11 N. E. 906; *Somerset Nat. Banking Co.'s Receiver v. Adams*, 72 S. W. 1125, 24 Ky. Law Rep. 2083. And see *Chaffin v. Cummings*, 37 Me. 76.

⁸⁷ See the cases cited above.

Formalities Required by Statute.

If the general or special law under which a corporation is organized prescribes particular formalities, compliance with the law is generally essential to a valid contract of subscription, for the legislature has a right to fix a particular mode for entering into such a contract. As was said by Judge Campbell in a Michigan case, no person can obtain rights of membership in a corporation except in compliance with its charter or governing law, and, if that prescribes any conditions or special methods of becoming a member, the law is imperative. There may be cases of mutual dealing which will estop the parties, but no contract of subscription can be valid if not in conformance with the statute.⁸⁸

Thus, where the statute or charter requires subscriptions in writing, verbal subscriptions are invalid.⁸⁹ So, where the statute under which a corporation is formed requires the associates to organize the corporation, and subscribe formal articles of association, a person who signs preliminary subscription papers, but does not subscribe the articles of association, does not become a shareholder, and cannot be held liable to the corporation as a subscriber. In *Poughkeepsie & S. P. R. Co. v. Griffin*⁹⁰ the statute under which the plaintiff corporation was organized, after providing for the opening of books for subscriptions, declared that when a certain amount of stock should be subscribed, and a certain percentage paid thereon, the subscribers might meet and elect directors, and that thereupon they should subscribe articles of association, in which should be set forth certain matters, and that each subscriber to such articles should subscribe thereto his name and place of residence, and the number of shares taken by him. It then provided for filing the articles of association in the office of the secretary of state, and declared that thereupon the persons who should so subscribe, and such persons as should from time to time become stockholders, should be a body corporate. The defendant, with others, signed a paper, agreeing to take a certain number of shares of stock, but he did not subscribe the articles of association. It was held that he was not liable as a subscriber, as the statute contemplated subscriptions only by subscribing the articles of association, and the paper signed by him was merely a preliminary agreement for the purpose of bringing the parties together.⁹¹ So, where the statute provides that the persons desiring to organize a corporation should make, sign, and acknowledge the articles

⁸⁸ *Carlisle v. Railroad Co.*, 27 Mich. 315, 318. See 1 Mor. Priv. Corp. § 67.

⁸⁹ *Vreeland v. Stone Co.*, 29 N. J. Eq. 188.

⁹⁰ 24 N. Y. 150.

⁹¹ And see *Troy & B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Dutchess & C. C. R. Co. v. Mabbett*, 58 N. Y. 397; *Sedalia, W. & S. Ry. Co. v. Wilkerson*, 83 Mo. 235; *Monterey & S. V. R. Co. v. Hildreth*, 53 Cal. 123. Compare, how-

of association, one who signs, but does not acknowledge, them, does not become liable as a subscriber.⁹²

Same—Subscriptions after Incorporation.

This principle applies to subscriptions after incorporation as well as subscriptions prior to and in contemplation of incorporation. Sometimes the disposal of unsubscribed stock is left to the unrestricted discretion of the corporation, but this is not always the case. To prevent abuse, unfairness, and fraud, the charter or governing statute often prescribes the method of subscribing to stock in corporations after they have been organized; and, unless a subscription is in compliance therewith, the subscriber does not become a member of the corporation, and therefore is not liable on his subscription, in the absence of elements of estoppel. In *Carlisle v. Saginaw Val. & St. L. R. Co.*⁹³ the charter of the corporation declared that the persons who should subscribe the articles of association, and all other persons who should, from time to time thereafter, subscribe to or become the holders of the capital stock of said corporation, "in the manner to be prescribed by its by-laws," should be a body corporate. It was held that a subscription made after incorporation, but before any by-laws were adopted, gave no rights to either party, and, nothing having been done to operate as an estoppel, the subscriber was held not bound by a subsequent by-law adopting his subscription. So, as we shall see, if the statute or articles of association appoint or prescribe particular agents to receive subscriptions, no other person has authority to receive them, and a subscription received by another agent is not binding either on the corporation or on the subscriber.⁹⁴

Same—Directory Provisions.

The fact that the statute prescribes a particular way in which subscriptions may be received will not be held to render invalid subscriptions made in other ways, and good at common law, unless the intent of the legislature to make the designated mode exclusive is clear. Thus, where the statute under which a corporation was formed provided that when the articles of association should be filed as therein provided the directors named in the articles might, in case the whole capital stock should not be subscribed, open books of subscription to fill up the capital stock, it was held that the legislature did not intend to prohibit other modes of receiving subscriptions, and that a subscription which was

ever, *Peninsular Ry. Co. v. Duncan*, 28 Mich. 130; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

⁹² *Coppage v. Hutton*, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305.

⁹³ 27 Mich. 315.

⁹⁴ *Post*, p. 286.

good at common law was binding, though not received in the mode prescribed by the statute.⁹⁵

Same—Substantial Compliance with Statute.

Not every slight departure from the directions of the statute will render a subscription invalid. It is enough if there is a substantial compliance. Thus it has been held that, if the statute requires the directors to open books of subscription for the purpose of filling up the capital stock, it is a sufficient compliance with the provision if they adopt a book provided before the corporation was organized, and accept subscriptions, with the assent of the persons who made them, made and entered therein before organization. "The statute," it was said, "can mean no more than that the subscriptions are to be made in a book provided by the directors for that purpose, and, if they adopt one some one else has provided, every purpose of the statute is satisfied."⁹⁶ So where the statute requires articles of association to be signed, setting forth the name of the corporation, its duration, and certain other matters, it has been held that it is sufficient if several separate papers, exact copies or transcripts of each other, setting forth the prescribed facts, are signed by the incorporators, some signing one and some signing another of them. The several papers may be regarded as one instrument.⁹⁷

MUTUAL CONSENT.

100. Mutual consent on the part of the subscriber and of the corporation is essential to a valid contract of subscription.

No true contract can exist without mutual consent. This is true of contracts of subscription to the capital stock of a corporation. In the absence of elements of estoppel, no person can be held liable as a subscriber to the stock of a corporation unless he has consented to become a stockholder, and to become so in that corporation.⁹⁸

For this reason a person who subscribes to the stock of a corporation which it is proposed to form for a particular purpose, and with particular powers, does not become a shareholder, and is not liable on his

⁹⁵ *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294. And see *Stuart v. Railroad Co.*, 32 Grat. (Va.) 146.

⁹⁶ *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294, 301. See *Woodruff v. McDonald*, 33 Ark. 97.

⁹⁷ *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451.

⁹⁸ *Dorris v. Sweeney*, 60 N. Y. 463; *Ticonic Water Power & Manuf'g Co. v. Lang*, 68 Me. 480; *Richmond Factory Ass'n v. Clarke*, 61 Me. 351; *Machias Hotel Co. v. Coyle*, 85 Me. 405, 58 Am. Dec. 712; *Stern v. McKee*, 70 App. Div. 142, 75 N. Y. Supp. 157; *West End Real Est. Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182; *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145, 73 N. E. 674.

subscription, if a corporation is formed by the other subscribers, without his consent, for a different purpose, or with different powers. In *Dorris v. Sweeney*,⁹⁹ the defendant signed a subscription paper for the formation of a corporation for the purpose of purchasing a patent "for preserving fruit or other products out of season," erecting a building, and "stocking the same with fruits to be preserved." Some of the subscribers organized a corporation under the general manufacturing act for "the manufacturing of preserved fruits, and the canning of fruits and other products, and the preserving and keeping of fruits and other articles from decay," etc. It was held that the defendant was not liable on his subscription, because the business of the company embraced branches in which he had never agreed to engage. So, in *Richmond Factory Ass'n v. Clarke*,¹⁰⁰ where a number of persons, including the defendant, signed an agreement to associate themselves together under a general law for the purpose of forming a manufacturing company, and the attorney general, to whom they had to apply under the law for a certificate, refused it, and some of those so subscribing, without the concurrence of the defendant, procured from the legislature a special act of incorporation to effectuate the purpose originally contemplated, it was held that the corporation so created could not enforce the defendant's original subscription.

On the same principle, where the subscription paper or the articles of association are materially altered without the consent of one of the subscribers thereto, he cannot be held liable on his subscription.¹⁰¹ And one who signs articles of association cannot be held liable as a subscriber if those articles are abandoned, and others substituted without his consent.¹⁰² So, where the certificate of incorporation varies materially from the preliminary subscription, a subscriber is not bound,—as where, by the subscription, the corporation should expire on a certain date, and the certificate fixes a much later date for expiration.¹⁰³

A subscription paper, to bind the subscribers, must be complete. Nothing must be left for further arrangement or consent. "A signature to an incomplete paper, wanting in any substantial particular, when no delegation of authority is conferred to supply the defect, does not bind the signer without further assent on his part to the completion of the instrument."¹⁰⁴ This applies to subscriptions. Therefore, where par-

⁹⁹ 60 N. Y. 463.

¹⁰⁰ 61 Me. 351.

¹⁰¹ *Burrows v. Smith*, 10 N. Y. 550; *Katama Land Co. v. Jernegan*, 126 Mass. 155.

¹⁰² *Southern Hotel Co. v. Newman*, 30 Mo. 118. See, also, *Richmond St. R. Co. v. Reed*, 83 Ind. 9.

¹⁰³ *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305. See, also, *Bucher v. Railroad Co.*, 76 Pa. 306.

¹⁰⁴ *Dutchess & C. C. R. Co. v. Mabbett*, 58 N. Y. 397.

ties subscribed articles of association, leaving blank the spaces for the names of the directors, it was held that they were not bound as subscribers on the insertion of names of directors without their consent.¹⁰⁵

SUBSCRIPTIONS INDUCED BY FRAUD.

101. A subscription induced by the fraud of agents of the corporation authorized to solicit or receive subscriptions, or by unauthorized agents whose receipt of the subscription has been ratified by the corporation, is voidable at the option of the subscriber to the same extent, and subject to the same rules, as a contract between individuals would be.

So long as a corporation is a going concern, having the management and possession of its property, contracts made with it are governed by the same principles of law as contracts between individuals; and it is therefore well settled that if one is induced to become a subscriber to its capital stock by the fraud of the corporation or of its officers or agents, and within a reasonable time after discovery of the fraud, there having been no laches on his part in discovering it, repudiates his subscription before the company becomes insolvent, he is entitled to be relieved of all liability on his subscription; and the mere fact that the company subsequently becomes insolvent, and action is brought by its assignee or receiver, can make no difference.¹⁰⁶ Where, however, after the subscription and before the subscriber has taken steps to rescind it, the equities of subsequent creditors have intervened, different considerations are presented. All cases concede that there must be no want of diligence on the part of the subscriber, either in discovering the fraud or in taking steps to rescind when he has discovered it.¹⁰⁷ And, while there are cases to the contrary,¹⁰⁸ the tendency of the courts is perhaps

¹⁰⁵ *Dutchess & C. C. R. Co. v. Mabbett*, 58 N. Y. 397. And see *McClelland v. Whiteley* (C. C.) 15 Fed. 322.

¹⁰⁶ *Fear v. Bartlett*, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721, W. D. Smith, Cas. Corp. 58, and *Shep. Cas. Corp.* 26; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414; *Vreeland v. Stone Co.*, 29 N. J. Eq. 188; *Ramsey v. Manufacturing Co.*, 116 Mo. 313, 22 S. W. 719; *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Walker v. Railroad Co.*, 34 Miss. 245; *Directors, etc., of Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Crump v. Mining Co.*, 7 Grat. (Va.) 352, 56 Am. Dec. 116; *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144; *Newton Nat. Bank v. Newbegin*, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727; *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607; *Beal v. Dillon*, 5 Kan. App. 27, 47 Pac. 317; and cases hereafter cited.

¹⁰⁷ *Turner v. Insurance Co.*, 65 Ga. 649, 38 Am. Rep. 801; post, p. 282.

¹⁰⁸ *Ramsey v. Manufacturing Co.*, 116 Mo. 313, 22 S. W. 719; dictum in *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414. See *Ramsey v. Manufacturing Co.*, 116 Mo. 313, 22 S. W. 719; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

to hold that if, after the subscription and before the subscriber has taken steps to repudiate it, the corporation has incurred debts, the equities of the creditors, who have contracted on the faith of the fraudulent subscription, are superior to those of the defrauded subscriber.*

Authority of Agents.

It was at one time held in England that, if the agents of a corporation by false and fraudulent representations induce a person to subscribe for shares, this does not entitle the subscriber to avoid the contract, nor give him a right of action against the corporation, but that his remedy is by action against the agents individually.¹⁰⁰ This view was based on the theory that the agents, in perpetrating the fraud, exceed their authority, and that the fraud therefore cannot be imputed to the corporation. These decisions have since been overruled, and it is now well settled, both in England and in this country, that, where the board of directors or other agents of a corporation, having authority to solicit or receive subscriptions for stock, induce a person to subscribe by false and fraudulent representations, the fraud is imputable to the corpora-

* *Turner v. Insurance Co.*, 65 Ga. 649, 38 Am. Rep. 801; *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *Deppen v. German-American Title Co.*, 70 S. W. 868, 24 Ky. Law Rep. 1110. And see *Tierney v. Parker*, 58 N. J. Eq. 117, 44 Atl. 151; *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27; *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904; *Stufflebeam v. De Lashmutt* (C. C.) 83 Fed. 449; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591. See *Taylor, Corp.* §§ 523-526; post, p. 282. "When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid,—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent." *Newton Nat. Bank v. Newbegin*, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727. See *Taylor, Corp.* §§ 523-526.

¹⁰⁰ See note by Hon. Seymour D. Thompson in 14 Am. Law Rep. 177, 178; *Holt's Case*, 22 Beav. 48; *Felgate's Case*, 2 De Gex, J. & S. 456; *Dodgson's Case*, 3 De Gex & S. 85; *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *Hubbard v. International Mercantile Agency*, 68 N. J. Eq. 434, 59 Atl. 24. Suit will lie in equity to rescind a subscription obtained by fraud, both against the individual officers who made the representations and the corporation, and the fact that the individuals received no benefit from the transaction does not release them from liability thereunder. *Mack v. Latta*, 178 N. Y. 525, 71 N. E. 97, 67 L. R. A. 126.

tion, and the subscriber may avoid his subscription.¹¹⁰ Some of the cases proceed on the theory that the representations are within the agent's apparent authority, while others proceed on the theory that the corporation cannot seek to reap the fruits of the contract without adopting the means by which it was obtained. If a person solicits subscriptions for a corporation without authority, and is guilty of fraud, the corporation, in afterwards ratifying his act in receiving the subscription, becomes bound by his fraud, and the subscription may be avoided.¹¹¹ Where, however, a person is induced by the fraudulent representations of a promoter to subscribe for stock in a corporation to be formed, it has been held that the subscriber cannot rescind, after formation of the corporation and its acceptance of the subscription, since a nonexisting corporation cannot have an agent, and hence the doctrine of ratification cannot be invoked to charge the corporation with the fraud.†

What Constitutes Fraud.

The rules for determining what representations or concealment of facts constitute such fraud as will avoid a contract of subscription are the same as in the case of any other contract. "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement, which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement, which misleads an individual."¹¹²

Before going into details, it may be said, substantially in the language

¹¹⁰ Note by Hon. Seymour D. Thompson, *supra*. See *Western Bank of Scotland v. Addie*, 5 Ct. Sess. Cas. (3d. Series) 80; *Ranger v. Railway Co.*, 5 H. L. Cas. 72; *Directors, etc., of Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Crump v. Mining Co.*, 7 Grat. (Va.) 352, 56 Am. Dec. 116, cases cited in note 106, *supra*, and in the following notes.

¹¹¹ *Walker v. Railroad Co.*, 34 Miss. 245.

† *St. Johns Mfg. Co. v. Munger*, 106 Mich. 90, 64 N. W. 3, 29 L. R. A. 63, 58 Am. St. Rep. 468; *Oldham v. Mt. Sterling Imp. Co.*, 103 Ky. 529, 45 S. W. 779; *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81; *Regener v. Hubbard* (Sup.) 56 N. Y. Supp. 173; *Contra: McDermott v. Harrison*, 56 Hun, 640, 9 N. Y. Supp. 184; *West End Real Estate Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182; *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607; *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337. The subscriber may rescind if the corporation had knowledge of the fraud when it accepted the subscription. *In re Metropolitan, etc., Ass'n*, [1892] 3 Ch. 1; *In re Metal Constituents, Ltd.*, [1902] 1 Ch. 707.

¹¹² Per Lord Romilly in *Directors, etc., of Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 125.

of Judge Chalmers in a Mississippi case,¹¹³ that, to avoid a subscription upon the ground of false representations by an agent of the corporation, it must appear that the statement was not made as an opinion, but as an ascertained and existing fact. It must not only be false in fact, but must also be either known to be so by the party uttering it, or his position must be one that made it his duty to know the truth. The resisting subscriber must show that he acted upon such statement; that his own position was such as warranted him in so acting; and that the statement was as to a fact material to the question of his subscription, and was relied upon by him. If the representations are as to matters controlled by the charter, and as to which the subscriber is bound to know that the agent has no right to make representations inconsistent therewith, they will not avoid the subscription. As to matters not controlled by the charter, false and fraudulent representations, which come within these limitations, and by which one has been entrapped into a subscription, will avoid the contract, just as fraud vitiates contracts of every character.

Fraud generally consists of a false representation of a material fact. But it must be borne in mind that concealment of facts may render a representation false.¹¹⁴ Thus, where a subscription to stock in a corporation was obtained by the representation that a prominent business man had subscribed for a large amount, but the fact that he had paid nothing for his shares was concealed, his subscription having been obtained for the express purpose of influencing others to subscribe, it was held that such concealment made the representation false and fraudulent, and was ground for avoiding the subscription.¹¹⁵

It is well settled that a misrepresentation of misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts. And this principle applies to subscriptions to the capital stock of a corporation as fully as to other contracts. It follows that misrepresentations by a corporation, or by its officers or agents, as to the legal effect of contracts of subscription to its stock, or as to the rights and powers of the corporation under its charter, though made for the purpose of inducing persons to subscribe, will not vitiate subscriptions, or constitute any defense in an action thereon, for such representations are as to a matter of law, subscribers being bound to take notice of the provisions of the charter, and of all general laws affecting the cor-

¹¹³ *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829.

¹¹⁴ *Clark*, Cont. (2d Ed.) 220.

¹¹⁵ *Coles v. Kennedy*, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503, and *W. D. Smith, Cas. Corp.* 56; *Alabama Foundry & M. Works v. Dallas*, 127 Ala. 513, 29 South. 459; *State Bank of Indiana v. Cook*, 125 Iowa, 111, 100 N. W. 72. And see *Crump v. Mining Co.*, 7 Grat. (Va.) 352.

poration, and of the terms and legal effect of subscription papers which they sign.¹¹⁶

Mere expressions of opinion or promises by the corporation or its officers or agents, though fraudulently made for the purpose of inducing a subscription, will not render the subscription voidable. The representation must be as to an existing fact. Thus it has been held that promises and representations as to what will be done by the corporation, and as to the advantages that will accrue to the subscribers, or as to the value of its assets and stock, or the holding out of flattering prospects, do not constitute such fraud as will vitiate a subscription induced thereby.¹¹⁷ So, false representations in respect to such matters as the ability of a railroad company to construct the road, and the time within which it will be done, will not avoid a subscription to its stock.¹¹⁸

False representations, however fraudulently they may have been made, will never avoid a subscription, unless the subscriber believed in them, and relied upon them, so that his subscription was induced by them. This is a well-settled principle, applicable to all contracts, including subscriptions.¹¹⁹

On the other hand, it is also well settled that, where there has been fraudulent misrepresentation or willful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his

¹¹⁶ *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, 1 Cumming, Cas. Priv. Corp. 824. In this case the defendant had subscribed for shares in a corporation, and taken certificates, under which, by law, he became liable to assessment for the full amount of the shares. In an action on his subscription he set up fraud on the part of the agents of the corporation, relying upon false representations by them that 20 per cent. only of his subscription was required to be paid, and that 80 per cent. was nonassessable. It was held that these representations, being as to matter of law, were no defense. See, also, in support of the text, *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Wight v. Railroad Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Ellison v. Railroad Co.*, 36 Miss. 572; *Clem v. Railroad Co.*, 9 Ind. 488, 68 Am. Dec. 653. Compare *Wert v. Turnpike Co.*, 19 Ind. 242.

¹¹⁷ *Richellen Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234, W. D. Smith, Cas. Priv. Corp. 48, Shep. Cas. Corp. 16; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Walker v. Railroad Co.*, 34 Miss. 245; *Saffold v. Barnes*, 39 Miss. 399; *Hughes v. Manufacturing Co.*, 34 Md. 316, 326; *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897. Compare *Union Nat. Bank v. Hunt*, 76 Mo. 439; *German Nat. Bank's Receiver v. Nagel*, 82 S. W. 433, 26 Ky. Law Rep. 748; *Zang v. Adams*, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249.

¹¹⁸ *Bish v. Bradford*, 17 Ind. 490; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385. See, also, *Wight v. Railroad Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *Walker v. Railroad Co.*, 34 Miss. 245.

¹¹⁹ *Parker v. Thomas*, 19 Ind. 213; *Walker v. Railroad Co.*, 34 Miss. 245, 256.

claim to be relieved from it, that he might have known the truth by proper inquiry; and this principle applies where a subscription to stock is induced by fraud.¹²⁰

The rule that fraud must result in injury, in order to render a contract voidable, applies where a subscriber seeks to avoid his contract on the ground of fraud.¹²² In *Connecticut & P. R. Co. v. Bailey*¹²³ the defendant sought to defeat an action on his subscription to the stock of a corporation on the ground that subscriptions previous to his, and on the strength of which he was induced to subscribe, were fictitious, because of a secret agreement with the subscribers that they should not be called upon to pay. It was held that, as these subscribers were bound according to the expressed and absolute terms of their subscriptions, and could not avail themselves of the secret agreement, the fraud did not injure the defendant, and that he could not avoid his contract. It was also said that the different subscriptions were independent, and that the defendant had no right to rely on them.¹²⁴ For a like reason, where a note is given in payment of a subscription previously made, the subscription cannot be avoided because of false representations at the time the note was given.¹²⁵

Subscription Voidable and not Void—Ratification and Rescission—Laches.

It is well settled that a subscription induced by false and fraudulent representations is not absolutely void, but, like other contracts induced by fraud, is merely voidable at the option of the subscriber. It is valid until repudiated.¹²⁶ If the defrauded subscriber affirms the subscription after discovery of the fraud, he cannot afterwards repudiate it.¹²⁷ And he will be held to have affirmed it if it appears that, with knowledge of the fraud, he took part as an officer or as a shareholder in the management of the corporation, or paid assessments on his shares, or took any benefit from his shares.¹²⁸

¹²⁰ *Directors, etc., of Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99.

¹²² *Connecticut & P. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, W. D. Smith, Cas. Corp. 63, Shep. Cas. Corp. 28; *Anderson v. Railroad Co.*, 12 Ind. 376, 74 Am. Dec. 218; *Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355. Cf. *Stern v. Kirby Lumber Co. (C. O.)* 134 Fed. 509.

¹²³ 24 Vt. 465, W. D. Smith, Cas. Corp. 63, Shep. Cas. Corp. 28.

¹²⁴ And see *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Blodgett v. Morrill*, 20 Vt. 509.

¹²⁵ *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240.

¹²⁶ See *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Farrar v. Walker*, 3 Dill. 506, note, Fed. Cas. No. 4,679; and cases in the following notes.

¹²⁷ *City Bank of Macon v. Bartlett*, 71 Ga. 797.

¹²⁸ *City Bank of Macon v. Bartlett*, 71 Ga. 797; *Fear v. Bartlett*, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721, W. D. Smith, Cas. Corp. 58, Shep. Cas. Corp.

To entitle a subscriber to be relieved from liability on his subscription on the ground that he was induced to subscribe by fraud, he must have exercised care and vigilance to discover the fraud, and, having discovered it, he must have acted promptly in repudiating his contract. "A man must not," said Lord Romilly, "play fast and loose; he must not say, 'I will abide by the company if successful, and I will leave the company if it fails;' and therefore, whenever a representation is made, of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company, or whether he will remain a member."¹²⁹

In England, under the companies act, a person who has been induced to subscribe to the stock of a corporation by fraud must not only repudiate the subscription within a reasonable time after discovery of the fraud, but he must take steps to have his name removed from the books of the company; and the proceedings to have his name removed must be instituted before the insolvency of the company. In the absence of a statute requiring this step on the part of the subscriber, it is held with us that removal of his name from the books of the corporation is not necessary to relieve a subscriber on the ground of fraud, but it is suffi-

28; *Lear v. S. K. Paige Lumber & M. Co.* (Tenn. Ch. App.) 42 S. W. 808; *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 45 Atl. 951. There may be circumstances under which a payment by the subscriber will not be held an affirmance. In *Fear v. Bartlett*, supra, it appeared that the defendant, who was unable to read or write, was induced by the fraud of a corporation to subscribe to its capital stock. Two months later he discovered the fraud, and immediately repudiated the contract. A year afterwards one of the directors came to the defendant, and told him he wanted to get \$10,000 to save the property of the company, and that he had paid \$5,000 in cash on account of his stock, and wanted to try and save what he had paid. To this the defendant replied that he would never give another dollar towards his subscription; but finally he said he was willing to give \$1,000 to save what he had already paid on his subscription, and thereupon he gave his check for that amount. It was held that under the circumstances, the defendant having testified that he did not intend a payment on his subscription, he should not be held to have affirmed his subscription.

¹²⁹ *Ashley's Case*, L. R. 9 Eq. 263, 268. And see *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, 1 Cumming, Cas. Priv. Corp. 824; *Ogilvie v. Insurance Co.*, 22 How. (U. S.) 380, 16 L. Ed. 349; *Upton v. Englehart*, 8 Dill. 496, Fed. Cas. No. 16,800; *Farrar v. Walker*, 3 Dill. 506, note, Fed. Cas. No. 4,679; *Directors, etc., of Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *City Bank of Macon v. Bartlett*, 71 Ga. 797; *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434, 67 N. W. 493; *Bartol v. Walton & W. Co.* (C. C.) 92 Fed. 13; *Urner v. Sollenberger*, 89 Md. 816, 48 Atl. 810; *Tierney v. Parker*, 58 N. J. Eq. 117, 44 Atl. 151; *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 45 Atl. 951.

cient if he repudiates the subscription, and gives the company notice thereof.¹⁸⁰

SUBSCRIPTIONS UNDER MISTAKE

102. If a person, without fault or negligence, signs a subscription paper under a mistake as to its nature, the subscription is not merely voidable, but void on the ground of mistake.

Fraud, as we have just seen, renders a subscription voidable. ~~Mis-~~take, on the other hand, renders a contract absolutely void. There are very few cases in which mistake can be set up to ~~defeat a~~ subscription. Perhaps it is safe to say that the only case is where the mistake was as to the nature of the transaction, and was induced by the deceit or other fault of the corporation or of some third party against which ordinary diligence could not guard.¹⁸¹ It has been said that: "If a person signs a subscription paper, entirely misunderstanding the nature of the instrument which he is signing, his subscription must be treated as null and void for want of mutual consent. In this case the question of fraud is not material."¹⁸² This is undoubtedly the law if the subscriber was not guilty of negligence in signing the paper.¹⁸³ If one should falsely read a subscription paper to a man who is unable to read, and he should sign it, without being guilty of negligence, the subscription would be void ab initio on the ground of mistake, and not merely voidable on the ground of fraud.¹⁸⁴

Subscriptions cannot be avoided because of a mistake as to the advantages to be gained by the incorporation. Thus it has been held that a subscription to a mill-dam corporation could not be avoided on the ground that the published estimate of the capacity of a mill was erroneous, and that the parties could not derive the expected benefits from the corporation, where there was no fraudulent intent to deceive those subscribing on the faith of the estimate.¹⁸⁵ Mistake of law can no more be set up as a defense in case of a subscription than in the case of any other contract.¹⁸⁶

¹⁸⁰ *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

¹⁸¹ See *Clark, Cont.* (2d Ed.) 196, for the cases in which mistake renders — a contract void.

¹⁸² 1 Mor. Corp. § 97.

¹⁸³ *Clark, Cont.* (2d Ed.) 198.

¹⁸⁴ *Rockford, R. I. & St. L. Co. v. Shunick*, 65 Ill. 223.

¹⁸⁵ *Salem Milldam Corp. v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

¹⁸⁶ *Clark, Cont.* (2d Ed.) 206.

SUBSCRIPTION BY AGENT.

103. A contract of subscription may be made by one person as agent for another, subject to the rules governing other contracts by agents. Some courts hold that one who assumes to subscribe as agent without authority does not himself become a stockholder, and so liable on the subscription, but is liable in damages for assuming to act without authority, while others hold him as a stockholder.

A contract of subscription, like any other contract, may be made by one person as agent for another, if he has authority, and, the subscription being accepted, and the shares apportioned to the agent for the principal, or to the principal, the latter becomes a stockholder as fully as if he had subscribed himself.¹³⁷ And where a person assumes to subscribe as agent for another without authority, the other may become a stockholder, and liable on the subscription by ratification.¹³⁸

It has been held by some of the courts that if a person subscribes another's name for shares in a corporation, without authority to do so, or where the other is not capable of subscribing, he thereby binds himself, and becomes a stockholder.¹³⁹ Other courts hold that he will be liable for damages in an action on the case for assuming to act without authority, but that he does not himself become a member of the corporation, and cannot be held liable on the subscription.¹⁴⁰ Ordinarily, it is immaterial that a subscription is made by an agent for an undisclosed principal; but such a subscription may be expressly or impliedly prohibited by the statute or charter. Thus, where an act incorporating a railroad company and appointing commissioners to open books and receive subscriptions required them, in case of subscriptions in excess of the capital stock, to distribute the stock among the subscribers in their discretion, and in a manner most advantageous to the company, it was held that, since the commissioners, to perform their duty, must know who the subscribers are, a subscription by an

¹³⁷ *Burr v. Willcox*, 22 N. Y. 551. It is, of course, essential that authority be shown. See *McClelland v. Whiteley* (C. C.) 15 Fed. 322.

¹³⁸ *Rutland & B. R. Co. v. Lincoln*, 29 Vt. 206. Declarations by the alleged principal to strangers, that he had taken the amount of stock subscribed for by the alleged agent, were held insufficient to show a ratification. *Rutland & B. R. Co. v. Lincoln*, *supra*. (See, also, as to what constitutes ratification, *Ticonic Water-Power Manuf'g Co. v. Lang*, 63 Me. 480; *McClelland v. Whiteley* (C. C.) 15 Fed. 322.)

¹³⁹ *State v. Smith*, 48 Vt. 266, 284; *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 South. 149; *Allibone v. Hager*, 46 Pa. 48.

¹⁴⁰ *Salem Milldam Corp. v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

agent for an undisclosed principal, for the purpose of evading the statute, was prohibited and unlawful.¹⁴¹

SAME—AGENTS TO RECEIVE SUBSCRIPTIONS.

104. The person receiving a subscription to stock in a corporation that has been organized must be duly authorized, or the corporation must ratify his act, to render the subscription binding.

105. If the charter, enabling act, or articles of association appoint particular agents to receive subscriptions, prior to or after organization, no other person has authority to receive them. They may, however, act by deputy.

106. Agents appointed to receive subscriptions have such authority only as is conferred upon them; but unauthorized acts or stipulations may be ratified by the corporation.

Corporations can only contract by agent when the agent has been given authority to enter into the contract. A contract entered into by a person purporting to act as agent for a corporation, but who has not been given authority for the purpose, does not bind the corporation, and therefore does not bind the other party.¹⁴² This is true of subscriptions taken by a person without authority.¹⁴³ Such a subscription will become binding, however, if the corporation ratifies its receipt, and adopts it.¹⁴⁴

It often happens that the charter, or enabling act, or articles of association appoint or prescribe particular agents to receive subscriptions to the stock of a corporation which it is proposed to organize, or which has been organized. When this is the case, no other person has any authority to receive subscriptions. A subscription received by any other person is absolutely void. In *Shurtz v. Schoolcraft & Three Rivers R. Co.*¹⁴⁵ the articles of association of a railroad company, as provided by the general law under which it was formed, named five commissioners to open books for subscriptions to stock. The commissioners did not open books, but a subscription paper was circulated by an agent appointed by the board of directors, and the defendant subscribed thereon, and subsequently on several occasions promised to pay his subscription. It was held that the subscription was a nullity, and that the defendant was not liable on it.¹⁴⁶

¹⁴¹ *Perkins v. Savage*, 15 Wend. (N. Y.) 412.

¹⁴² Post, p. 480.

¹⁴³ *Essex Turnpike Corp. v. Collins*, 8 Mass. 292.

¹⁴⁴ Post, p. 486.

¹⁴⁵ 9 Mich. 269.

¹⁴⁶ And see *Parker v. Railroad Co.*, 33 Mich. 23; *Northern Cent. Michigan R. Co. v. Eslow*, 40 Mich. 222.

It has been held that the receiving of subscriptions by commissioners appointed for that purpose is a ministerial act, since any one has a right to subscribe by complying with the statute, and that it may, therefore, be performed by an agent or deputy appointed by the commissioners, and that the commissioners may ratify a subscription received by one without authority.¹⁴⁷ But where the commissioners are required to distribute stock when more than the authorized amount has been subscribed, this power is a judicial one, being "a power to exercise a discretion founded on such considerations as may appear to them beneficial to the company's interests," and cannot be exercised by deputy. There being no provision that a majority shall constitute a quorum, all of the commissioners must be present to hear and consult, though a majority may then decide. A distribution at a meeting of less than all the commissioners is coram non judice and void.¹⁴⁸

Agents appointed to receive subscriptions, either before or after incorporation, have such authority only as is conferred upon them.¹⁴⁹ If they do unauthorized acts, or enter into unauthorized stipulations with subscribers, such acts or stipulations may become binding on the corporation by ratification or adoption, if within its powers.¹⁵⁰

SAME—CONDITIONAL SUBSCRIPTIONS.

107. A conditional subscription to stock of a corporation is a subscription to take effect only on the fulfillment of a condition precedent. The subscriber does not become a shareholder, nor liable on his subscription, until the condition is substantially performed according to its terms. When it is so performed, the subscription becomes absolute and unconditional. *x*
108. Conditional subscriptions after organization of a corporation are valid. Such subscriptions prior to and for the purpose of organization have also been sustained; but, by the better opinion, where it is proposed to organize a corporation under a charter or enabling act requiring a certain amount of stock to be subscribed, all subscriptions prior to organization must be absolute and unconditional. In some states, where a conditional subscription is made in such a case, the subscription is held void; but in others the condition only is void, and the subscription is valid.
109. Conditions precedent may be waived either by express agreement or by conduct showing such an intent.

¹⁴⁷ Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. And see Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

¹⁴⁸ Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

¹⁴⁹ Post, p. 480.

¹⁵⁰ Post, p. 486.

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By conditional subscription is meant a subscription the liability on which and the rights under which are dependent upon a condition precedent. Until the condition is fulfilled, no rights or liabilities at all arise out of the subscription. There is another class of subscriptions sometimes erroneously called "conditional subscriptions." These are absolute subscriptions on special terms. They are described by some writers and courts as subscriptions on conditions subsequent, but the better term is that applied by Mr. Morawetz, "subscriptions upon special terms."¹⁵¹ They are subscriptions which are absolute in so far as the liability thereon is concerned, and which make the subscriber a shareholder before compliance with the stipulations contained therein. The stipulations are merely terms of the contract of membership for the breach of which by the corporation the subscriber must resort to his remedy against it, as by action for damages.¹⁵² This class of subscriptions will be considered in the next section, and we will then see more at length the distinction between them and subscriptions upon conditions precedent, and the principles upon which it is determined whether a particular stipulation is a condition precedent or merely a special term.

Subscriptions after Organization of the Corporation.

A person, in subscribing for stock in a corporation which has already been organized, has a right to make his subscription dependent upon the performance or fulfillment of a condition precedent, provided the corporation sees fit to accept such a subscription, and provided such subscriptions are not expressly or impliedly prohibited by its charter. In other words, he has a right to agree with the corporation that he will take stock and become a shareholder when a certain thing happens or is done. To allow such subscriptions after the corporation has been organized is not contrary to public policy. In such a case the subscriber does not become a shareholder, and therefore is not entitled to the rights nor subject to the liabilities of a shareholder, until the condition is performed according to its terms. His subscription is merely an agreement, or, according to some opinions, an offer, to become a shareholder when the condition has been fulfilled. Upon its fulfillment, without any further act or assent on his part, he becomes a shareholder and is liable on his subscription.¹⁵³

¹⁵¹ 1 Mor. Corp. § 82 et seq.

¹⁵² Post, p. 294.

¹⁵³ Taggart v. Railroad Co., 24 Md. 563, 89 Am. Dec. 760; Webb v. Railroad Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; Corey v. Morrill, 61 Vt. 598, 17 Atl. 840; Ashtabula & N. L. R. Co. v. Smith, 15 Ohio St. 328; Chase v. Railroad Co., 38 Ill. 215; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318; Caley v. Railroad Co., 80 Pa. 363; Hanover Junction & S. R. Co. v. Grubb, 82 Pa. 36; Montpelier

Thus, where a subscription to stock in a railroad company is expressly made upon condition that the road shall be located upon a certain route, the location of the road upon that route is a condition precedent to any liability on the subscription. The subscriber does not become a shareholder at all until then, but when the road is so located the subscription becomes absolute and unconditional, and the subscriber becomes eo instanti a shareholder, with all the rights and privileges and subject to all the liabilities of the other shareholders.¹⁵⁴ So, a subscription to stock of a railroad company may be made upon condition that the road shall be put under contract for grading or construction between certain points,¹⁵⁵ or that it shall be completed in whole or in part, or completed and put in operation,¹⁵⁶ or that a contract shall be made for equipping and ironing it.¹⁵⁷ So a person may subscribe on condition that a certain amount of stock shall be subscribed. In such a case he does not become a shareholder, and is not liable on his subscription, until bona fide binding and absolute subscriptions to the amount specified and of the kind specified have been received; and, if some of the subscriptions relied upon to make up the

& *W. River R. Co. v. Langdon*, 46 Vt. 284; *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

¹⁵⁴ *McMillan v. Railroad Co.*, 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 364; *Taggart v. Railroad Co.*, 24 Md. 563, 89 Am. Dec. 760; *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. 559; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385. Such a condition only requires location of the road on the route designated. It does not require actual construction and completion of the road before calling for payment of subscriptions. *Miller v. Railroad Co.*, 40 Pa. 237, 80 Am. Dec. 570. In New York it has been held that it is contrary to public policy to allow subscriptions to the capital stock of a railroad, turnpike, or other similar corporation, on condition that the road shall be located on a certain route, or that its station or depot shall be located at a particular point, as it was considered that the directors should be left free to so act in these respects as to best serve the interests of the public. They hold that such a subscription is void, and the subscriber does not become a shareholder on performance of the condition. *Butternuts & Oxford Turnpike Co. v. North*, 1 Hill (N. Y.) 518; *Ft. Edward & F. M. Plank-Road Co. v. Payne*, 15 N. Y. 583. Most courts, however, sustain such a condition, at least if the company is not restricted from also locating lines, stations, or depots along other routes, or at other points, or otherwise doing whatever the public convenience may require, and many of them sustain such conditions without qualification. See the cases cited above.

¹⁵⁵ *Connecticut & P. R. R. Co. v. Baxter*, 32 Vt. 805.

¹⁵⁶ *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842; *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897; *Leshner v. Karshner*, 47 Ohio St. 302, 24 N. E. 882; *Webb v. Railroad Co.*, 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396.

¹⁵⁷ *Brand v. Railroad Co.*, 77 Ga. 506, 1 S. E. 255.

required amount were conditional, it must be shown that the conditions have been performed, so that the subscriptions have become absolute.¹⁵⁸

As stated above, in the case of a subscription upon condition precedent, the condition must be performed before any liability on the subscription will attach. And it must be performed according to its terms, and within the time limited, or within a reasonable time, where no time is specified.¹⁵⁹ A substantial performance, however, as is the case with other contracts, is sufficient.¹⁶⁰

In some of the cases it is said that a conditional subscription which the corporation is authorized to receive is a mere continuing offer until the condition is performed; that the condition must be performed to constitute an acceptance of it; and that until then it may be withdrawn.¹⁶¹ But other courts, more properly, it seems, hold that after acceptance or assent by the corporation to a conditional subscription, which it is authorized to take, the subscriber is bound until performance of the condition to await such performance; that he cannot withdraw the subscription unless the performance is unreasonably delayed.¹⁶² If performance of the condition is unreasonably delayed, he may withdraw,¹⁶³ or perhaps the subscription would lapse without express withdrawal.¹⁶⁴ If a time is specified for performance of the condition, the subscription will lapse, and become void, if it is not performed within that time.¹⁶⁵

A conditional subscription, which is not a present valid contract, because the corporation has no authority at the time it is made to accept conditional subscriptions, will constitute a continuing offer to subscribe upon the specified conditions; and when those conditions

¹⁵⁸ *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. 318; *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536; *Brand v. Railroad Co.*, 77 Ga. 506, 1 S. E. 255; *People's Ferry Co. v. Balch*, 8 Gray (Mass.) 303; *Troy & G. R. Co. v. Newton*, Id. 596; *New York Exchange Co. v. De Wolf*, 31 N. Y. 278; *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838; post, p. 299. Of course void subscriptions, like subscriptions at common law by married women, cannot be considered in determining whether the required amount has been subscribed. *Hahn's Appeal* (Pa.) 7 Atl. 482. Where the condition of a subscription to stock of a railroad company is that, in the judgment of the directors, a sufficient amount be subscribed to build the road, the condition is performed when the board of directors in good faith pass a resolution that sufficient stock has been subscribed, though they may be mistaken. *Cass v. Railway Co.*, 80 Pa. St. 31.

¹⁵⁹ *Ticonic Water Power & Manuf'g Co. v. Lang*, 63 Me. 480.

¹⁶⁰ 1 Cook, Stock, Stockh. & Corp. Law, § 86; *O'Neal v. King*, 48 N. C. 517.

¹⁶¹ *Webb v. Railroad Co.*, 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396.

¹⁶² *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

¹⁶³ See *Stevens v. Corbitt*, 83 Mich. 458.

¹⁶⁴ See *Blake v. Brown*, 80 Iowa, 277, 45 N. W. 751.

¹⁶⁵ *Ticonic Water Power & Manuf'g Co. v. Lang*, 63 Me. 480.

are performed, if the offer be not before withdrawn, it will become an absolute and unconditional subscription.¹⁶⁶ The difference between such a subscription and a conditional subscription which the corporation is authorized to receive is that the former becomes a binding contract when accepted, though the subscriber does not become a shareholder, nor liable as such, until the condition is performed, while the latter does not become binding until the condition is performed, and may, at any time before then, be withdrawn.¹⁶⁷

Subscriptions Prior to Incorporation.

Subscriptions upon conditions precedent, made prior to procuring a special charter, or prior to the organization of the corporation under a general law, have been sustained in some cases.¹⁶⁸ But the validity of such subscriptions is very doubtful, for they allow individuals to obtain charters from the government on subscriptions which may never become binding. Furthermore, they may operate as a fraud upon other persons who subscribe absolutely, and on the faith of the other subscriptions, and upon creditors who trust the corporation on the faith of such subscriptions.

It has been held, and may perhaps be regarded as established law, that where the charter or enabling act, under which it is proposed to organize a corporation, requires a certain amount of stock to be subscribed before corporate powers can be exercised, persons subscribing for stock prior to organization of the corporation, and for the purpose of organization, cannot attach conditions, but their subscriptions must be absolute and unconditional. The commissioners or other agents have no power to receive subscriptions dependent upon conditions precedent. As was said by the Pennsylvania court, "the commissioners who are appointed to receive subscriptions are not the accredited agents of the corporation, for it is not yet in being, but are rather the agents of the public, acting under limited and definite powers, which every one is bound to know; and, if he be misled by representations which such agents have no right to make, it is his own folly." Any other rule would lead to the procurement from the commonwealth of valuable charters without any absolute capital for their support, and thus give rise to a system of speculation and fraud which would be intolerable."¹⁶⁹ So, in *Burke v. Smith*,¹⁷⁰ it was said by Mr. Justice Strong, speaking of the invalidity of conditional subscrip-

¹⁶⁶ *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

¹⁶⁷ *Armstrong v. Karshner*, supra.

¹⁶⁸ See *Montpelier & W. R. R. Co. v. Langdon*, 46 Vt. 284; *People's Ferry Co. v. Balch*, 8 Gray (Mass.) 303.

¹⁶⁹ *Caley v. Railroad Co.*, 80 Pa. 363.

¹⁷⁰ 16 Wall. (U. S.) 390, 21 L. Ed. 361.

tions prior to organization of a railroad corporation: "When a company is incorporated under general laws, * * * and the law prescribes that a certain amount of stock shall be subscribed before corporate powers shall be exercised, if subscriptions, obtained before the organization was effected, may be subsequently rendered unavailable by conditions attached to them, the substantial requirements of the laws are defeated. The purpose of such a requisition is that the state may be assured of the successful prosecution of the work, and that creditors of the company may have, to the extent, at least, of the required subscription, the means of obtaining satisfaction of their claims. The grant of the franchise is, therefore, made dependent upon securing a specified amount of capital. If the subscriptions to the stock can be clogged with such conditions as to render it impossible to collect the fund which the state required to be provided before it would assent to the grant of corporate powers, a charter might be obtained without any available capital. Conditions attached to subscriptions, which, if valid, lessen the capital of the company, thus depriving the state of the security it exacted that the railroad would be built, and diminishing the means intended for the protection of creditors, are, therefore, a fraud upon the grantor of the franchise, and upon those who may become creditors of the corporation. They are also a fraud upon unconditional stockholders, who subscribed to the stock in the faith that capital sufficient would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost. It is for these reasons that such conditions are denied any effect."

In New York it is held that a conditional subscription prior to such an incorporation is a nullity, and that no rights or liabilities at all can arise out of it.¹⁷¹ In Pennsylvania it is held that the condition only is void, and that the subscription is to be treated as absolute and unconditional.¹⁷²

Conditions must be Expressed in the Writing.

In Pennsylvania, because of the fact that the courts of law in that state have equitable jurisdiction, a written contract that is absolute on its face may be shown by parol evidence to have been conditional, and oral conditions precedent may be shown to defeat a recovery on a written subscription that is absolute on its face.¹⁷³ In most, if not in all, of the other states the rule excluding parol evidence to vary a

¹⁷¹ *Troy & B. R. Co. v. Tibbitts*, 18 Barb. (N. Y.) 297.

¹⁷² *Caley v. Railroad Co.*, 80 Pa. 363; *Boyd v. Railway Co.*, 90 Pa. 169; *Pittsburgh & S. R. Co. v. Bliggar*, 34 Pa. 455; *Bavington v. Railroad Co.*, Id. 358.

¹⁷³ See *Miller v. Railroad Co.*, 87 Pa. 95, 30 Am. Rep. 349.

written contract will render oral conditions void, and a condition, to have any effect, must be expressed in the writing.¹⁷⁴

Waiver of Condition Precedent.

Performance of a condition precedent in a subscription may be waived by the subscriber, and in such a case he cannot set up non-performance to escape liability on the subscription.¹⁷⁵ And the waiver may not only be by an express agreement, either oral or written, but it will be implied from any conduct on his part which clearly shows an intention not to insist upon the condition. Thus, in the absence of special circumstances negating an intent to waive a condition, a waiver will be implied if the subscriber, knowing, or with the means of knowing, that the condition has not been complied with, acts as a shareholder, or pays his subscription.¹⁷⁶

¹⁷⁴ 1 Thomp. Corp. § 1149; *Masonic Temple Ass'n of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716; *Wight v. Railroad Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173.

¹⁷⁵ 1 Thomp. Corp. § 1336; *O'Donald v. Railroad Co.*, 14 Ind. 259; *Slipher v. Earhart*, 83 Ind. 173; *Chamberlain v. Railroad Co.*, 15 Ohio St. 225; *Hutchins v. Smith*, 46 Barb. (N. Y.) 235; *Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189; *Wright v. Agelasto*, 164 Va. 159, 51 S. E. 191; post, p. 301.

¹⁷⁶ *Cornell's Appeal*, 114 Pa. 153, 6 Atl. 258; *Mack's Appeal* (Pa. Sup.) 7 Atl. 481. But see, contra, *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423. The decision in this case is the result of the ruling in Massachusetts that a subscription raises no implied promise to pay, and that the express promise is collateral to it. That part payment of a subscription is a waiver of unperformed conditions precedent, see *Cornell's Appeal*, supra; *Mack's Appeal*, supra. Giving unconditional notes for the amount of a subscription is a waiver of a condition precedent in the subscription, if it appears from the dates on which they are payable, or from other circumstances, the performance of the condition was not intended to precede payment of the notes. *Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355. But it is otherwise if the circumstances under which the notes were given do not show an intention to waive the condition. *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Hawkins v. Citizens' Real-Estate & L. Co.*, 88 Or. 544, 64 Pac. 320.

SUBSCRIPTIONS UPON SPECIAL TERMS.

- 110. Subscriptions upon special terms are absolute subscriptions, by virtue of which the subscriber becomes a shareholder, and liable on his subscription, without performance of the stipulations, the stipulations being merely terms of his contract of membership.**
- 111. Subscriptions upon special terms are valid except**
- (a) Where the stipulations are ultra vires, or inconsistent with the charter or articles of incorporation.**
 - (b) Where they operate as a fraud upon the other shareholders by subjecting the subscriber to lighter burdens, or giving him greater rights and privileges.**
 - (c) Where they operate as a fraud upon the creditors of the corporation who contract with it on the faith of the capital stock being fully paid.**
- 112. Only the managing agents of a corporation—as the directors—have power to accept subscriptions on special terms, but they may adopt or ratify such subscriptions taken without authority by commissioners prior to incorporation, or by other agents.**

The distinction between conditional subscriptions or subscriptions upon conditions precedent, which we have considered in the preceding section, and subscriptions upon special terms, or, as they are sometimes inaptly termed, subscriptions upon conditions subsequent, is a very important one. In the former, as we have seen, the subscriber does not become a shareholder at all, nor liable on his subscription, until the condition has been performed.¹⁷⁷ In the latter, liability on the subscription, and the right to membership, do not depend at all upon performance of the stipulations. The subscriber becomes a shareholder at once, with all the rights and liabilities of a shareholder, and the stipulations are merely terms of his contract of membership, for the breach of which he must seek his remedy against the corporation.¹⁷⁸ In *Paducah & M. R. Co. v. Parks*¹⁷⁹ a subscription to stock in a railroad company provided that one-fourth should be

¹⁷⁷ Ante, p. 287.

¹⁷⁸ "A subscription on a condition subsequent contains a contract between the corporation and the subscriber whereby the corporation agrees to do some act, thereby combining two contracts—one, the contract of subscription; the other, an ordinary contract of a corporation to perform certain specified acts. The subscription is valid, and enforceable whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy." 1 Cook, Stock, Stockh. & Corp. Law, § 78, quoted with approval in *Morrow v. Steel Co.*, 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 648. And see 1 Mor. Priv. Corp. § 82.

¹⁷⁹ 86 Tenn. 554, 8 S. W. 842.

paid when the road should be completed to a certain county line, the remainder "to be paid in four equal installments of four months as the work progresses through the county, provided the company establishes a depot on said road" at a certain point. It was held that completion of the road to the specified county line was a condition precedent to any liability on the subscription, being made so by express terms, but that the erection of the depot was an independent stipulation, and not a condition precedent to rights of membership and liability on the subscription. So, in *Red Wing Hotel Co. v. Friedrich*,¹⁸⁰ the defendants had subscribed for shares in a hotel company to be organized the shares to be paid for at such times and in such amounts as the board of directors might from time to time require. The subscription provided that it was upon the condition that the hotel to be built by the company should be located on a certain block. It was held that the building of the hotel was not a condition precedent to the right of the corporation to assess the shares and collect the assessments, as it was evident that the parties intended that the hotel should be built with money realized on the subscriptions.¹⁸¹

Whether a particular stipulation in a subscription is a condition precedent or merely an independent stipulation or special term is purely a question of intention, and the intention is to be determined by considering, not only the words of the particular clause, but also the language of the whole contract, the situation of the parties, the nature of the act required, and the whole subject-matter to which it relates.¹⁸² The courts lean strongly towards holding stipulations to be special terms, rather than conditions precedent. While the validity of conditional subscriptions is too firmly established to be now questioned, the courts do not favor them, and they will not hold a stipulation to be a condition precedent unless the intention to make it so is clear. This is proper, for, if a subscriber desires to make his liability dependent upon the performance of stipulations by the corporation, it is very easy for him to do so in express terms.¹⁸³ A stipulation certainly can never be considered a condition precedent when it appears that it was contemplated that the subscriber should vote at stockholders' meetings, or otherwise act as a shareholder.¹⁸⁴

¹⁸⁰ 26 Minn. 112, 1 N. W. 827.

¹⁸¹ For other illustrations of special terms, as distinguished from conditions precedent, see *Johnson v. Railroad Co.*, 81 Ga. 725, 8 S. E. 531; *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434, 67 N. W. 493.

¹⁸² See *Lane v. Brainerd*, 30 Conn. 565; *Johnson v. Railroad Co.*, 81 Ga. 725, 8 S. E. 531.

¹⁸³ *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842.

¹⁸⁴ 1 Mor. Priv. Corp. § 89; *Morrow v. Steel Co.*, 87 Tenn. 262, 10 S. W. 495, 501, 3 L. R. A. 37, 10 Am. St. Rep. 658.

And clearly, when a subscription is conditioned that the money acquired therefrom shall be expended in a certain way, the stipulation is a special term, and not a condition precedent, for the money cannot be expended until it has been paid.¹⁸⁵

Validity of Subscriptions upon Special Terms.

A corporation has no authority to receive subscriptions upon special terms where the stipulations are beyond its powers, or inconsistent with the charter or articles of incorporation. This is clear, and does not require the citation of authorities. Nor has it the power to receive a subscription upon such terms as will operate as a fraud upon the other shareholders by subjecting the subscriber to lighter burdens, or giving him greater rights and privileges, or as a fraud upon creditors of the corporation by withdrawing the capital. It is well settled, therefore, that an agreement between a corporation and a subscriber, by which the subscription is not to be payable, or is to be payable in part only, whether it be for the purpose of pretending that the stock is really greater than it is, or for the purpose of preventing the predominance of certain shareholders, or for any other purpose, is illegal and void, and cannot be interposed as a defense in an action on the subscription.¹⁸⁶ In these cases the stipulation itself only is void, and does not affect the subscription. The courts hold the subscriber to his subscription as if the unlawful agreement had not been

¹⁸⁵ *Henderson & N. R. R. v. Leavell*, 16 B. Mon. (Ky.) 358. In *Connecticut & P. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, W. D. Smith, Cas. Corp. 63, Shep. Cas. Corp. 28, there was a requirement in the charter of a railroad company that it should, within a certain time, expend a given sum in the construction of its road. The court held that this was not a condition precedent to liability on subscriptions. It would have been the same had the provision been expressly incorporated in the subscription. "It would be extremely inconsistent," it was said, "to say that the corporation must expend that sum in the construction of its road; and at the same time deny the right and power of collecting their subscriptions for that purpose."

¹⁸⁶ *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Melvin v. Insurance Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Union Mut. Life Ins. Co. v. Frear Stone Manuf'g Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Hickling v. Wilson*, 104 Ill. 54; *Bates v. Lewis*, 3 Ohio St. 459; *Henry v. Railroad Co.*, 17 Ohio, 187; *Meyer v. Blair*, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. Rep. 500; *New York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440, W. D. Smith, Cas. Corp. 42, Shep. Cas. Corp. 21; *Northrop v. Bushnell*, 38 Conn. 498; *Burke v. Smith*, 16 Wall. (U. S.) 390, 21 L. Ed. 361; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, 1 Cumming, Cas. Priv. Corp. 824; *Robinson v. Railroad Co.*, 32 Pa. 334, 72 Am. Dec. 792; *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, W. D. Smith, Cas. Corp. 63, Shep. Cas. Corp. 28; *Blodgett v. Morrill*, 20 Vt. 509; *Boney v. Williams*, 55 N. J. Eq. 691, 38 Atl. 189. So. an agreement that a subscriber may withdraw the money paid for his shares, and cancel the subscription, is void. *Melvin v. Insurance Co.*, *supra*; *post*, p. 819.

made, as the only means of preventing fraud and protecting the other subscribers and creditors.¹⁸⁷

An agreement that a subscriber need not pay at all, or that he need pay part only of his subscription, is void as against creditors of the corporation, even though the corporation and all the other shareholders may be parties to it; but, if no rights of creditors intervene, and the subscription is not necessary to make up the amount of stock required by the charter, so that there is no fraud upon the state, the agreement is binding upon the corporation and the other shareholders.¹⁸⁸

Subject to the restrictions above stated, a corporation may accept subscriptions upon special terms. A railroad company may agree to build a depot at a certain place in order to procure subscriptions from the residents of that neighborhood.¹⁸⁹ It may be agreed that the stock may be paid for in work or in materials, provided the work or materials are an equivalent in value.¹⁹⁰ "In general, subscriptions to the capital stock of a corporation may be conditional as to the time, manner, or means of payment, or in any other way not prohibited by statute, or the rules of public policy, and not beyond the corporate powers of the corporation to comply with."¹⁹¹

Who may Receive Subscriptions on Special Terms.

Only the managing agents of a corporation are authorized to receive subscriptions upon special terms. They cannot be received prior to incorporation by the commissioners appointed to receive subscriptions, unless such authority is expressly conferred upon them by the charter or articles of association.¹⁹² But a subscription upon special terms, received by such agents without authority, may, if not withdrawn, be treated as a continuing offer to the corporation, and will become binding if accepted by the managing agents after the corporation has been organized.¹⁹³ An agent to solicit subscriptions, appointed by the managing agents of a corporation after its organization, cannot accept subscriptions upon special terms unless authority to do so has been conferred upon him. If he does accept such a sub-

¹⁸⁷ See the cases above cited.

¹⁸⁸ *Winston v. Brooks*, 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507.

¹⁸⁹ *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842.

¹⁹⁰ *Post*, p. 865.

¹⁹¹ 1 *Cook, Stock, Stockh. & Corp. Law*, § 83. A contract by a corporation to sell shares with option to the buyer to return and receive back the price, no rights of creditors being involved, is valid. *Vent v. Duluth Coffee & S. Co.*, 64 Minn. 307, 67 N. W. 70. Cf. *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760.

¹⁹² 1 *Mor. Corp.* § 83.

¹⁹³ 1 *Mor. Corp.* § 86.

scription, however, without authority, the managing agents may ratify his act, and render the subscription binding.

CONDITIONAL DELIVERY OF SUBSCRIPTION.

113. If a subscription absolute in its terms is delivered in escrow, to take effect as a contract only upon the fulfillment of a condition--

- (a) It does not take effect until the condition is fulfilled, if the delivery was to a stranger, and not to the corporation or its agent, and the condition may be shown by parol evidence.
- (b) Most courts, perhaps, hold the rule to be the same where it was so delivered to the corporation or its agent; but some courts apply the rule governing deeds that there can be no delivery in escrow to the other party or his agent, and that in such case the oral conditions are void, and the delivery absolute.
- (c) The subscriber may be estopped to set up the oral conditions to escape liability on his subscription, if others have subscribed and paid their subscriptions in the belief that his subscription was absolute, or if persons have contracted with the corporation in such belief.

A written subscription to stock, like other written instruments, may be delivered to some third person in escrow; that is, to take effect as a contract only on the happening of a contingency. In such a case it will not take effect until the condition is fulfilled. It is a well-settled rule that, to constitute a good delivery of a deed in escrow, the instrument must be delivered to some third person. If it is delivered to the other party or his agent, the condition is void, and the delivery absolute, for a delivery in fact outweighs verbal conditions.¹⁹⁴ Some courts have applied this rule to contracts not under seal, and have held that delivery of a written subscription to the agent of a corporation is an absolute delivery to the corporation. It has been so held where a subscription was delivered to the commissioners appointed to receive subscriptions,¹⁹⁵ and, it seems, where it was delivered to the promoter of a corporation, the promoter being regarded as the agent of the body of subscribers to take and hold subscriptions.¹⁹⁶ It has been held by most courts, however, that where a contract absolute in its terms is not under seal, it is admissible to show by parol evidence that it was delivered, even when delivered to the other party or his agent, with the understanding that it should not be operative as a contract from its delivery, but only on the happen-

¹⁹⁴ Clark, Cont. (2d Ed.) 56, and cases there cited.

¹⁹⁵ Wight v. Railroad Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

¹⁹⁶ Minneapolis Threshing-Mach. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 8 L. R. A. 796, 12 Am. St. Rep. 701.

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ing of a contingency.¹⁹⁷ And in these jurisdictions the rule must apply to subscriptions as well as to other simple contracts.¹⁹⁸

Assuming that the rule last stated does not apply to subscriptions, the doctrine of equitable estoppel may prevent the subscriber from setting up the defense to defeat an action on his subscription. According to this doctrine, where a person, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other. It has been held, therefore, that where a person subscribes to the stock of a proposed corporation, and delivers the subscription to the promoter, or other agent, and other persons, without notice of any oral condition attached to such delivery, also subscribe to the stock, and pay the same in, and in reliance on the subscriptions the corporation is organized, engages in its business, expends large sums of money, and contracts liabilities therein, such person, when sued for installments due on his stock subscriptions, will not be allowed to defeat a recovery by showing that he attached a secret oral condition to the delivery of his subscription.¹⁹⁹

SUBSCRIPTION OF ENTIRE CAPITAL—DISTRIBUTION.

114. There is an implied condition that the whole amount of stock specified in the charter, articles of association, contract of subscription, or fixed by the incorporators or directors when authorized to settle the same, shall be actually taken by bona fide, binding, absolute, and unconditional subscriptions, before the subscribers shall be liable on their subscriptions. But

(a) The implication may be rebutted by the terms of the charter, articles of association, or contract of subscription.

(b) A subscriber may expressly or impliedly waive the condition.

115. Where stock is subscribed in excess of the authorized amount, and a distribution becomes necessary, the distribution is a condition precedent to liability on subscriptions.

Where the charter or articles of association fix the amount of the capital stock of the corporation, there is generally an implied condition that the full amount shall be actually taken before the subscribers shall be liable on their subscriptions.²⁰⁰ The same implication arises

¹⁹⁷ Westman v. Krumwelde, 30 Minn. 313, 15 N. W. 255. *Thayer 120-943*

¹⁹⁸ Cass v. Railway Co., 80 Pa. 31.

¹⁹⁹ Minneapolis Threshing-Mach. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701. And see Gilman v. Gross, 97 Wis. 224, 72 N. W. 885.

²⁰⁰ Anderson v. Railroad, 91 Tenn. 44, 17 S. W. 803, W. D. Smith, Cas. Corp. 53, Shep. Cas. Corp. 12; Salem Milldam Corp. v. Ropes, 6 Pick. (Mass.) 23;

where the contract of subscription fixes the amount of the capital stock.²⁰¹ And it arises where the amount is fixed by the incorporators or board of directors, when they are authorized to settle the same. In such a case the amount of stock must be settled and subscribed.²⁰² The rule also applies where the charter authorizes the corporation, when organized under a fixed capital, to increase it. When so increased, the amount fixed becomes the capital which must be subscribed before legal assessments can be made.²⁰³ The condition need not be expressed. It arises by implication, says Mr. Cook, "from the just and reasonable understanding of a subscriber that he is to be aided by other subscriptions"; and "the rule is supported also by public

Stoneham Branch R. Co. v. Gould, 2 Gray (Mass.) 277; Penobscot R. Co. v. Dummer, 40 Me. 172; Penobscot R. Co. v. White, 41 Me. 512, 68 Am. Dec. 257; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181, W. D. Smith, Cas. Corp. 63, Shep. Cas. Corp. 28; Hughes v. Manufacturing Co., 34 Md. 316, 331; Bray v. Farwell, 81 N. Y. 600; New Hampshire Central Railroad v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Read v. Gas Co., 9 Helsk. (Tenn.) 545; Masonic Temple Ass'n of Minneapolis v. O'hannell, 43 Minn. 353, 45 N. W. 716; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232; Exposition Ry. & Imp. Co. v. Canal St. E. Ry. Co., 42 La. Ann. 370, 7 South. 627; International Fair & Exposition Ass'n v. Walker, 88 Mich. 62, 49 N. W. 1086; Portland & F. R. Co. v. Spillman, 23 Or. 587, 32 Pac. 688; Hale v. Sanborn, 16 Neb. 1, 20 N. W. 97.

²⁰¹ See People's Ferry Co. v. Balch, 8 Gray (Mass.) 303; Troy & G. R. Co. v. Newton, Id. 596; Atlantic Cotton Mills v. Abbott, 9 Cush. (Mass.) 423; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536; Brand v. Railroad, 77 Ga. 506, 1 S. E. 255; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318; Level Land Co. v. Heyward, 95 Wis. 109, 69 N. W. 567. And see Audenried v. East Coast Milling Co. (N. J. Ch.) 59 Atl. 577; ante, p. 289.

²⁰² Anderson v. Railroad, 91 Tenn. 44, 17 S. W. 803, W. D. Smith, Cas. Corp. 53, Shep. Cas. Corp. 12; Troy & G. R. Co. v. Newton, 8 Gray (Mass.) 596; Proprietors of Cabot & West Springfield Bridge v. Chapin, 6 Cush. (Mass.) 50; Atlantic Cotton Mills v. Abbott, 9 Cush. (Mass.) 423; Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481; Rockland, M. D. & S. Steamship Co. v. Sewall, 80 Me. 400, 14 Atl. 939; World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724.

²⁰³ Read v. Gas Co., 9 Helsk. (Tenn.) 545. And see Eaton v. Bank, 144 Mass. 260, 10 N. E. 844; Winters v. Armstrong (C. C.) 37 Fed. 508. In Nutter v. Railroad Co., 6 Gray (Mass.) 85, a railroad company voted to issue 600 additional shares for the purpose of raising money to pay off indebtedness, and to allow each stockholder to take one new share for every two shares held by him, provided he should, by a certain day, subscribe therefor, and pay a part of the amount, and give notes for the remainder. It was held that there was no implied condition that the whole 600 shares should be issued, and that the failure of the corporation to issue that amount was no ground for maintaining an action by a subscriber for some of such stock to recover back the money paid by him thereon, nor for defeating an action on the notes given by him.

policy, in that corporate creditors have a right to rely on the belief that the full capital stock of the corporation has been subscribed.”²⁰⁴

The implication may be rebutted by the terms of the charter, articles of association, or contract of subscription, as where the corporation is authorized to commence business before the whole capital stock is subscribed.²⁰⁵ And a subscriber may expressly or impliedly waive the condition. A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbids the doing of any corporate act until the requisite stock is taken.²⁰⁶ So a waiver may be implied if a subscriber acts as a stockholder or officer of the corporation,²⁰⁷ or pays installments on his subscription, knowing that the entire capital stock has not been subscribed.²⁰⁸

²⁰⁴ 1 Cook, Stock, Stockh. & Corp. Law, § 176. And see *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277; *Denny Hotel Co. of Seattle v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130.

²⁰⁵ *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776; *Schloss v. Trade Co.*, 87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51; *Anderson v. Railroad Co.*, 91 Tenn. 44, 17 S. W. 803, W. D. Smith, Cas. Corp. 53, Shep. Cas. Corp. 12; *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray (Mass.) 244, 71 Am. Dec. 753; *Willamette Freighting Co. v. Stannus*, 4 Or. 261; *Astoria & S. C. R. Co. v. Hill*, 20 Or. 177, 25 Pac. 379; *Port Edwards, C. & N. Ry. Co. v. Arpin*, 80 Wis. 214, 49 N. W. 828; *Mandel v. Swan Land & C. Co.*, 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124; *Oldham v. Mt. Sterling Improvement Co.*, 103 Ky. 529, 45 S. W. 779; *Anglo-American Land Mortg. & A. Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437. Where the corporation is authorized to begin business when a part of its capital stock is subscribed, subscription of that amount only is necessary before assessments can be made. *Schenectady & S. Plank-Road Co. v. Thatcher*, 11 N. Y. 102; *Boston, Barre & G. R. Co. v. Wellington*, 113 Mass. 79; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480. And see the other cases cited in this note. In *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776, the articles of association provided that “the capital stock of said corporation shall be \$50,000, of which \$14,500 has been subscribed, * * * and the residue may be issued and disposed of as the board of directors may from time to time order and direct.” The company had begun business before the defendant subscribed for his stock. It was held that the implied condition that no subscription shall be payable until the whole capital stock is subscribed did not arise. And see *Nutter v. Railroad Co.*, note 203, *supra*.

²⁰⁶ *Anderson v. Railroad Co.*, 91 Tenn. 44, 17 S. W. 803, W. D. Smith, Cas. Corp. 53, Shep. Cas. Corp. 12; *Hamilton v. Railroad Co.*, 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; *Gibbons v. Ellis*, 83 Wis. 434, 53 N. W. 701. See *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99.

²⁰⁷ *Masonic Temple Ass’n v. Channell*, 43 Minn. 353, 45 N. W. 716; *Cornell’s Appeal*, 114 Pa. 153, 6 Atl. 258; *Auburn Opera-House & P. Ass’n v.*

²⁰⁸ See *Cornell’s Appeal*, 114 Pa. 153, 6 Atl. 258.

It has been held that an assessment for the purpose of defraying preliminary expenses, as expenses incurred in obtaining the act of incorporation, and ascertaining the practicability and utility of the enterprise, is valid.²⁰⁹

It is almost too clear to require the citation of authority that subscriptions cannot be counted in order to make up the required amount, unless they are binding. Subscriptions, therefore, by married women, infants, and insane persons, which are void or voidable under the law of the particular jurisdiction, cannot be taken into consideration unless paid in.²¹⁰ Nor can ultra vires subscriptions by a corporation be considered.²¹¹ Unauthorized and unratified subscriptions by one as agent for another cannot be counted in those jurisdictions where it is held that the person assuming to act as agent does not himself become a shareholder.²¹² It is otherwise where, as in some states, it is held that he does himself become a shareholder, and liable on the subscription.²¹³ Conditional subscriptions cannot be taken into consideration unless the conditions have been fulfilled, so that they have become absolute and unconditional; and the burden of showing this is on the corporation or creditors seeking to enforce the subscriptions.²¹⁴ Subscriptions by fictitious persons, or persons known to

Hill (Cal.) 32 Pac. 587; *McFarland v. Westside Imp. Ass'n.*, 56 Neb. 277, 76 N. W. 584; *Doak v. Stahlman* (Tenn. Ch. App.) 58 S. W. 741. There is no such waiver, however, from the fact that a subscriber, without knowledge that the requisite amount of stock had not been taken, on several occasions consented to and waived notice of stockholders' meetings, and on one occasion voted by proxy at a special meeting. *Portland & F. R. Co. v. Spillman*, 23 Or. 587, 32 Pac. 688. See *International Fair & Exp. Ass'n v. Walker*, 88 Mich. 62, 49 N. W. 1086.

²⁰⁹ *Salem Milldam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232.

²¹⁰ *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 219; *Appeal of Hahn* (Pa.) 7 Atl. 482; ante, p. 270.

²¹¹ *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130. Cf. *W. A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149. The fact that subscriptions were ultra vires is not a defense to a subscriber in an action to collect assessments, where he stood by without objection, and does not show that such subscriptions were not paid, or that they were repudiated. *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; ante, p. 145.

²¹² *Salem Milldam Corp. v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363; *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105; ante, p. 286.

²¹³ See *State v. Smith*, 48 Vt. 266, 284.

²¹⁴ *Brand v. Railroad Co.*, 77 Ga. 506, 1 S. E. 255; *Oskaloosa Agr. Works v. Parkhurst*, 54 Iowa, 357, 6 N. W. 547; *Portland & F. R. Co. v. Spillman*, 23 Or. 587, 32 Pac. 688; *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142.

be insolvent, cannot be counted.²¹⁵ But apparent responsibility is all that can be required. A subscription cannot be avoided, nor an action thereon defeated, because of the financial irresponsibility of other subscribers for shares necessary to be subscribed, if the other subscriptions were taken in good faith from persons apparently responsible.²¹⁶ Whether a subscription upon special terms can be counted depends upon whether the terms reduce the amount to be paid upon the subscription below par, or for any other reason render the subscription invalid. If they do, they cannot be counted.²¹⁷ Some courts allow consideration of subscriptions entered into in good faith, payable in labor or materials, if the value of the labor or materials equals the amount of the subscription.²¹⁸ By the weight of authority, however, such subscriptions cannot be considered.²¹⁹

The fact that the full amount of capital stock has been subscribed may be shown by the records of the corporation, subject, of course, to rebuttal by evidence to the contrary.²²⁰ If the legislature has appointed commissioners to take subscriptions, and made it their duty, when the required amount is raised, to notify a meeting of subscribers for the organization of the corporation, and, after organization, to certify the fact to the secretary of state, the certificate of the commissioners showing that the required amount of stock was subscribed is conclusive, and a subscriber cannot defeat an action on his subscription by alleging that some of the subscriptions were not bona fide.²²¹

²¹⁵ *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236. See *Denny Hotel Co. of Seattle v. Schram*, 6 Wash. 134, 32 Pac. 1002, 86 Am. St. Rep. 130.

²¹⁶ *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Salem Milldam Corp. v. Ropes*, 9 Pick. (Mass.) 187, 19 Am. Dec. 363. It is otherwise if the corporation treats such subscriptions as invalid, and ignores them. *Salem Milldam Corp. v. Ropes*, *supra*.

²¹⁷ See *New York Exchange Co. v. De Wolf*, 31 N. Y. 273; *Blodgett v. Morrill*, 20 Vt. 509. In *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, the full amount of stock was subscribed, but subscriptions contained a provision that interest should be paid by the corporation on all sums assessed and paid in, from the time of payment until the plaintiff's road should be put in operation. It was held that this provision did not amount to an agreement to pay back to the subscribers a part of the capital stock, so as to result in the whole stock not being subscribed.

²¹⁸ See *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 219.

²¹⁹ 1 Cook, *Stock, Stockh. & Corp. Law*, § 180; *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75 (compare *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86); *Troy & G. R. Co. v. Newton*, 8 Gray (Mass.) 596.

²²⁰ *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

²²¹ *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, *W. D. Smith, Cas. Corp.* 63, *Shep. Cas. Corp.* 28. Where the duty of determining as an existing fact the true amount of the stock subscription was imposed on

Excessive Subscription—Distribution.

If more than the authorized amount of stock is subscribed, so that a distribution becomes necessary in order to determine who are stockholders, and the number of shares each subscriber is entitled to, a distribution is necessary before a subscriber can be held liable.²²² In the distribution of stock the commissioners act judicially, and all must be present to hear and consult, though a majority may decide. A distribution at a meeting of less than all of them is coram non jndice and void.²²³

PAYMENT OF DEPOSIT.

116. There is a conflict of opinion as to the effect of a failure to comply with a requirement in the charter or general law that a deposit, or percentage of each subscription, shall be paid at the time of subscribing.

(a) Where the subscription is prior to organization, it is held:

(1) In some states, that the provision is for the benefit of the public, and that noncompliance renders a subscription void.

(2) In other states, that the provision is for the benefit of the corporation, and may be waived by it, or that the subscriber cannot take advantage of his own wrong in failing to pay.

(b) Where the subscription is after incorporation, the provision will be construed as intended for the benefit of the corporation, unless the intention of the legislature to the contrary is clear, and noncompliance is no defense in an action on the subscription.

It is often provided, both in general laws authorizing the formation of corporations and in special charters, that a deposit, or a certain percentage of subscriptions, shall be paid at the time of subscribing. There is a direct conflict of opinion as to the object of this provision, and the authorities, therefore, do not agree as to the effect of a failure to comply therewith on subscriptions. Some courts have thought that the object in the case of subscriptions prior to organization, is to insure bona fide subscriptions, and "to prevent the subscription list from being filled with the names of nominal sub-

the original incorporators, their decision that such amount had been subscribed before applying for a charter was conclusive, in an action on a subscription, in the absence of fraud. *Louisiana Purchase Exposition Co. v. Kuenzel*, 108 Mo. App. 105, 82 S. W. 1099.

²²² *Burrows v. Smith*, 10 N. Y. 550; *Bristol Creamery Co. v. Tilton*, 70 N. H. 239, 47 Atl. 591. Such excessive subscription must be affirmatively shown, in an action on a subscription, in order to put the corporation to proof of a distribution; the presumption being that no more than the authorized amount was subscribed. *Buffalo & N. Y. C. R. Co. v. Dudley*, 14 N. Y. 336, 346.

²²³ *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

scribers and the creatures of others,"²²⁴ and that the provision is intended not merely for the benefit of the corporation, but as a protection to the public, to prevent charters from being obtained fraudulently and by irresponsible persons. These courts hold that payment of the deposit in the case of subscriptions prior to incorporation is a condition precedent to the right of the subscriber to membership, and to his liability on his subscription; and that the condition, being imposed on grounds of public policy, and not merely for the benefit of the particular corporation, cannot be waived, either by the commissioners appointed to receive subscriptions or by the corporation itself when organized.²²⁵ Other courts hold either that the provision is intended for the benefit of the corporation, and may therefore be waived by it, or that it is the duty of the subscriber to pay, and that he cannot take advantage of his own wrong in failing to do so; and they therefore hold that failure to pay the deposit, while it would give the corporation a right to refuse to recognize the subscription, does not render it void, and cannot be set up to defeat an action by the corporation or its creditors against the subscriber.²²⁶ Perhaps the former of these views is supported by the weight of authority. The latter seems the better sustained by reason. Of course, if the legislature clearly expresses the intention that there shall be no liability on the subscription if the deposit is not paid, the statute must be given this effect.

It would seem clear that a provision requiring payments by subscribers to the stock of a corporation that is already organized must be considered as intended for the benefit of the corporation only, and may be waived by it, and so it has been held.²²⁷ Where a statute ap-

²²⁴ *President, etc., of Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. (Pa.) 219, 226, 11 Am. Dec. 593.

²²⁵ *Jenkins v. President, etc.*, 1 Calnes, Cas. (N. Y.) 86; *President, etc., of Highland Turnpike v. M'Kean*, 11 Johns. (N. Y.) 98; *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208; *Beach v. Smith*, 30 N. Y. 116; *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 473; *President, etc., of Hibernia Turnpike Road v. Henderson*, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593; *Boyd v. Railroad Co.*, 90 Pa. St. 169; *Taggart v. Railroad Co.*, 24 Md. 563, 89 Am. Dec. 760.

²²⁶ *Wight v. Railroad Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; citing *President, etc., of Union Turnpike Road v. Jenkins*, 1 Calnes (N. Y.) 381, which was reversed in *Jenkins v. President, etc.*, 1 Calnes, Cas. (N. Y.) 86; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654, relying on *Wight v. Railroad Co.*, supra; *Stuart v. Railroad Co.*, 32 Grat. (Va.) 146, 166 (where no reasons are given nor authorities cited); *Henry v. Railroad Co.*, 17 Ohio, 187 (dictum); *Minneapolis & St. L. Ry. Co. v. Bassett*, 20 Minn. 535 (Gil. 478), 18 Am. Rep. 376. Compare *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30 (distinguished in *Taggart v. Railroad Co.* 24 Md. 563, 89 Am. Dec. 760).

²²⁷ This distinction was expressly recognized in *Taggart v. Railroad Co.*, 24 Md. 563, 89 Am. Dec. 760, and was so decided in *Oler v. Railroad Co.*, 41

pointed commissioners to open books and receive subscriptions, and provided that when a certain amount should be subscribed they should certify that fact to the governor, who should thereupon issue letters of incorporation, it was held that a provision in that section of the statute requiring five dollars on each share to be paid the commissioners at the time of subscribing only applied to subscriptions received by the commissioners, and that the corporation, after organization, could receive subscriptions without such payment.²²⁸

Where payment of a deposit at the time of subscribing is required by the statute, payment not at the time, but subsequently, renders the subscription binding.²²⁹ So, where a person subscribed for stock on the understanding that the first installment of 10 per cent. required to be paid at the time of subscribing should be paid in subsequent services, and he subsequently claimed more for such services actually rendered than such installment, and the corporation paid him the balance, it was held that the subscription was binding.²³⁰ Payment is often expressly required to be made in money or cash, and, even in the absence of such an express requirement, the statute would be construed to mean payment in money or its equivalent. Payment by a note is not sufficient.²³¹ A check may be received for the deposit in the usual course of business, and, if presented and paid, will be a compliance with the statute;²³² but the commissioners cannot receive indorsed checks if it is known that the drawers have no funds, nor could a check be taken and held for the purpose of evading the statute.²³³ The deposit may be paid in services which the company has a right to contract and pay for, as this is equivalent to payment in cash.²³⁴

Md. 593, and *Webb v. Railroad Co.*, 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396. And see *Montpeller & W. R. R. Co. v. Langdon*, 46 Vt. 284. But see *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208, and the other New York cases cited in note 225, *supra*.

²²⁸ *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. 318. And see *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

²²⁹ *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208.

²³⁰ *Beach v. Smith*, 30 N. Y. 116.

²³¹ *Boyd v. Railway Co.*, 90 Pa. 169. Compare *Greenville & C. R. Co. v. Woodsides*, 5 Rich. Law (S. C.) 145, 55 Am. Dec. 708.

²³² *Rothchild v. Hoge*, 43 Fed. (C. C.) 97, 100.

²³³ *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

²³⁴ *Beach v. Smith*, 30 N. Y. 116.

DELIVERY OF CERTIFICATE.

117. A certificate of stock, being merely evidence of the ownership of shares, is not necessary to make a subscriber a stockholder, with all the rights, and subject to all the liabilities, of stockholders. Nor is delivery or tender of a certificate necessary before action on a subscription, unless made so by the terms of the subscription.

A certificate of stock is merely evidence of the ownership of shares by the holder, and is not at all necessary to membership, even where issuance of certificates is required by the charter. In such a case, if the corporation refuses to issue a certificate to a subscriber, a court of equity might compel it to do so; but mere failure to issue or tender a certificate does not prevent a subscriber from becoming a shareholder, with all the rights, and subject to all the liabilities of shareholders.²⁸⁵ Nor is the tender of a certificate necessary before bringing an action on a subscription.²⁸⁶ The parties may, however, expressly contract that the stock shall not be paid for until the certificate has been issued and delivered, and in such a case no action can be maintained by the corporation on the subscription until it has delivered or tendered a certificate.²⁸⁷ The rule that a certificate need not be delivered or tendered in order to maintain an action on a subscription does not apply to the case of a sale of stock, but such a contract stands on the same footing as a contract of sale of any other property.²⁸⁸

²⁸⁵ *Chester Glass Co. v. Dewey*, 18 Mass. 94, 8 Am. Dec. 128; *Brigham v. Mead*, 10 Allen (Mass.) 245; *Wemple v. Railroad Co.*, 120 Ill. 196, 11 N. E. 906; *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317, W. D. Smith, Cas. Corp. 44; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Beckett v. Houston*, 32 Ind. 393, 398; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Rutter v. Kilpatrick*, 63 N. Y. 604; *Webb v. Railroad Co.*, 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Miller v. Road Co.*, 52 Ind. 51; *Schaeffer v. Insurance Co.*, 46 Mo. 248; *Fulgam v. Railroad Co.*, 44 Ga. 597; *Chaffin v. Cummings*, 37 Me. 76; *Courtright v. Deeds*, 37 Iowa, 503; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 11 Sup. Ct. 984, 35 L. Ed. 702; *W. A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149. A subscription right is assignable, though no stock has been issued. *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

²⁸⁶ Cases above cited.

²⁸⁷ See *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38; *Courtright v. Deeds*, 37 Iowa, 503.

²⁸⁸ *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38; *Summers v. Sleeth*, 45 Ind. 598; *Fulgam v. Railroad Co.*, 44 Ga. 597.

REMEDY OF CORPORATION ON SUBSCRIPTIONS.

- 118.** In most states a subscription to the capital stock of a corporation implies a promise to pay assessments, upon which the corporation may maintain assumpsit. In Massachusetts and several other New England states an express promise must be shown.
- 119.** A corporation has no inherent power to forfeit or sell shares upon nonpayment of assessments; but the power is almost always expressly conferred. The power must be exercised in strict accordance with the charter or statute, or the forfeiture or sale will be invalid.
- 120.** The fact that the corporation is given the remedy by forfeiture does not prevent it from maintaining assumpsit. The remedies are cumulative.
- 121.** A forfeiture releases the subscriber from further liability, but it is otherwise where the charter provides for a sale of the shares, and leaves the subscriber liable for any deficiency.

Action to Recover Assessments.

In several of the New England states, including Massachusetts, it is the settled doctrine that a mere subscription, or agreement to take shares in a corporation, though accepted and acted upon by the corporation after its organization, does not raise an implied promise on the part of the subscriber to pay assessments on the shares, so as to entitle the corporation to maintain assumpsit on the subscription; that to support such an action an express promise to pay must be shown; and that an agreement to take shares is not an express promise to pay assessments.²³⁹ In these states, in the absence of an express promise, the only remedy of the corporation is that given it by the statute, generally to forfeit, or forfeit and sell, the shares of delinquent shareholders. In most states the courts repudiate this doctrine, and it is held that the mere fact of subscription, where the subscription has been accepted by the corporation, raises an implied promise

²³⁹ *Andover & Medford Turnpike Corp. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80; *Mechanics' Foundry & Machine Co. v. Hall*, 121 Mass. 272; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Franklin Glass Co. v. Alexander*, 2 N. H. 380, 9 Am. Dec. 92; dictum in *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *W. D. Smith, Cas. Corp.* 63, *Shep. Cas. Corp.* 28. But see *Windsor Electric Light Co. v. Tandy*, 66 Vt. 248, 29 Atl. 248, 44 Am. St. Rep. 838. Cf. *Anglo-American Land & Mortg. & A. Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437. By subscribing to stock in a foreign corporation the subscriber subjects himself to the laws of the foreign country in respect to the powers and obligations of such corporation. *Nashua Savings Bank v. Anglo-American Land, Mortg. & A. Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782.

on the part of the subscriber to pay assessments, on the ground that there is a legal liability to pay them; and that, "whenever there is a legal liability, the law creates a promise upon which an action of assumpsit will lie."²⁴⁰ As we have seen, there is a sufficient consideration for the promise in the interest acquired by the subscriber in the corporate franchises and property, and the right to share in the profits.

Forfeiture and Sale of Shares.

A corporation has no inherent power to forfeit or sell the shares of stock of a delinquent shareholder for nonpayment of assessments. That is not a common-law remedy, and can only be exercised when it is expressly conferred by the charter, or by some statute, or by agreement of the stockholders.²⁴¹ The power, however, is almost always conferred either to sell the shares to pay overdue assessments, or to forfeit them to the use of the corporation. It cannot be conferred by a by-law unless it is expressly authorized.²⁴²

In declaring a forfeiture of stock for nonpayment of assessments the corporation must adopt a course of proceeding reasonable and just to the stockholder. Reasonable notice to him that his stock will be forfeited, unless by a specified time the overdue assessments are paid, is necessary to effect a forfeiture.²⁴³ In all cases the power to

²⁴⁰ *Instone v. Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638; *Hughes v. Manufacturing Co.*, 34 Md. 316, 326; *Windsor Electric Light Co. v. Tandy*, 66 Vt. 248, 29 Atl. 248, 44 Am. St. Rep. 838; *Dayton v. Borst*, 31 N. Y. 435; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Rensselaer & Washington Plank-Road Co. v. Barton*, 16 N. Y. 457, note; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, 1 Cumming, Cas. Priv. Corp. 824; *Griswold v. Trustees*, 26 Ill. 41, 79 Am. Dec. 361; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499, 506; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Miller v. Road Co.*, 52 Ind. 51; *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed (Tenn.) 566; *Bavington v. Railroad Co.*, 34 Pa. 358; *Dexter & Mason Plank-Road Co. v. Millerd*, 3 Mich. 91; *Carson v. Mining Co.*, 5 Mich. 288; *American Alkali Co. v. Campbell* (C. C.) 113 Fed. 398. A subscription payable partly in cash and partly in stock of another corporation must be accepted according to its terms, and the corporation cannot retain the cash payment and maintain an action to recover the difference on an unpaid subscription. *Southern Trust & D. Co. v. Yeatman*, 134 Fed. 810, 67 C. C. A. 456.

²⁴¹ *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60; *Minnehaha Driving Park Ass'n v. Legg*, 50 Minn. 333, 52 N. W. 898; *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. And see *Perrin v. Granger*, 30 Vt. 595.

²⁴² Post, p. 440.

²⁴³ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. 124, 100 Am. Dec. 546; *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654. And see *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541.

forfeit or sell must be exercised in the manner prescribed. A sale or forfeiture of shares without following the requirements of the charter or statute is just as invalid as if made without any power at all,²⁴⁴ and an invalid sale may constitute a conversion of the shares for which the corporation will be liable in damages.²⁴⁵ In *Budd v. Multnomah St. Ry. Co.*²⁴⁶ a statute provided that a corporation might make by-laws for the sale of stock for nonpayment of assessments, and it was held that a sale without a valid by-law authorizing it was invalid, and constituted a conversion of the shares. In this case the board of directors had passed a resolution ordering these particular shares to be sold, but it was held that this was not a by-law, because directed only against a particular shareholder.²⁴⁷ A sale of shares after a valid tender of the amount due for assessments is unauthorized and void, and a suit in equity may be maintained to set the same aside, and restrain a transfer of the shares to the purchaser.²⁴⁸ To authorize a forfeiture or sale of shares for nonpayment of assessments, the assessments must be valid. A sale for nonpayment of several assessments, one of which is invalid, is void.²⁴⁹ The measure of damages for conversion of shares by illegally selling them for nonpayment of assessments is not the full value of the shares, but their value less the amount of unpaid calls due thereon.²⁵⁰

If a corporation follows the provisions of its charter relating to the forfeiture of stock, its right to forfeit at the end of the time limited is perfect, and a stockholder who is in default can claim no further delay nor any other notice than that prescribed and given. When a forfeiture is regularly declared in accordance with the charter, equity will not relieve against it.²⁵¹

²⁴⁴ *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60; *Portland, S. & P. R. Co. v. Graham*, 11 Metc. (Mass.) 1; *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. 124, 100 Am. Dec. 546; *Schwab v. Frisco Mining & M. Co.*, 21 Utah, 258, 60 Pac. 940. Although a forfeiture be irregular or defective in form, it will be held sufficient as against creditors of the corporation, if the corporation and the stockholder, with knowledge of the defects, have acquiesced in it. *Crissey v. Cook*, 67 Kan. 20, 72 Pac. 54. As where a private sale is made, instead of a sale at public auction, as required by the statute. *Portland, S. & P. R. Co. v. Graham*, *supra*.

²⁴⁵ *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60.

²⁴⁶ 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. p. 169, W. D. Smith, Cas. Corp. 60.

²⁴⁷ As to the validity of by-laws, see post, p. 440.

²⁴⁸ *Mitchell v. Mining Co.*, 67 N. Y. 280.

²⁴⁹ *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277.

²⁵⁰ *Budd v. Railway Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60.

²⁵¹ *Germantown Pass. Ry. Co. v. Fittler*, 60 Pa. 124, 100 Am. Dec. 546.

Action and Forfeiture as Cumulative Remedies.

The fact that the corporation is given the right to proceed against delinquent shareholders by forfeiture of their shares, or by forfeiture and sale of them, does not prevent it from maintaining assumpsit for assessments, either on an express promise, or on the implied promise which arises in most states. The statutory remedy is merely cumulative, unless it is clearly made exclusive, and the corporation may proceed in either way.²⁵²

Whether assumpsit can be maintained after resorting to the statutory remedy depends upon the nature of the statutory remedy. If, under the charter, the stock of a delinquent shareholder is merely forfeited to the use of the corporation,—that is, reclaimed by it to its own use,—on his failure to pay an assessment, the charter having, in effect, made the issue of the stock, not absolute, but in the nature of a conditional sale, the remedy by action is taken away.²⁵³ And when forfeiture is made an alternative, and not a cumulative, remedy, the same result follows.²⁵⁴ The reason is that such a forfeiture necessarily involves a total loss of interest in the thing forfeited by the party in default, and a resumption by the corporation of the entire consideration of the debtor's promise. The stock forfeited vests absolutely and beneficially in the company, and the debtor can have no benefit from it or its proceeds, though the corporation might afterwards sell it for more than was due from him.²⁵⁵

Where, however, the security reserved by the charter to the corporation is less than forfeiture; where it is simply a power of sale to pay unpaid assessments, with the right reserved to the debtor to any surplus that may remain, so that the issue of the stock is absolute, and not conditional, and the security is in the nature of a mortgage or

²⁵² *Instone v. Bridge Co.*, 2 Bibb (Ky.) 576; *Worcester Turnpike Corp. v. Willard*, 5 Mass. 80, 4 Am. Dec. 39; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499, 506; *Goshen & M. T. Co. v. Hurtn*, 9 Johns. (N. Y.) 217, 6 Am. Dec. 278; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Connecticut & P. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, *W. D. Smith, Cas. Corp.* 63, *Shep. Cas. Corp.* 28; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Hughes v. Manufacturing Co.*, 34 Md. 316, 326; *Tar River Nav. Co. v. Neal*, 10 N. C. 520, 535; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578, 583; *Nashua Savings Bank v. Anglo-American Land-Mortg. & A. Co.*, 108 Fed. 764, 48 C. C. A. 15; *Campbell v. American Alkali Co.*, 125 Fed. 207, 61 C. C. A. 317.

²⁵³ *Small v. Hydraulic Co.*, 2 N. Y. 330; *Mills v. Stewart*, 41 N. Y. 384; *Allen v. Railroad Co.*, 11 Ala. 437; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

²⁵⁴ *Edinburgh L. & N. Ry. Co. v. Hebblewhite*, 6 Mees. & W. 707; *Giles v. Hutt*, 3 Exch. 18; *Great Northern Ry. Co. v. Kennedy*, 4 Exch. 417.

²⁵⁵ In *Carson v. Mining Co.*, 5 Mich. 288. And see *Small v. Hydraulic Co.*, 2 N. Y. 330.

pledge,—a sale of stock for nonpayment of assessments does not take away the company's right of action, but it may maintain an action for a deficiency after applying the proceeds of the stock.²⁵⁶ An unsuccessful attempt to follow the remedy by forfeiture and sale could not bar an action to recover assessments. The shares not being sold the liability of the shareholder on his promise would remain.²⁵⁷ In some charters it is expressly provided that, if the shares of a delinquent stockholder shall not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be held liable to the corporation for any deficiency. Of course, in such a case, a forfeiture and sale does not preclude an action for a deficiency.²⁵⁸

Not only does a forfeiture of shares by a corporation for nonpayment of assessments put an end to any liability of the shareholder to the corporation on his subscription, as shown above, but it relieves him from liability to existing or future creditors of the corporation if it becomes insolvent, provided there is no fraud or collusion.²⁵⁹ But a forfeiture by collusion between the shareholder and directors will not release him.²⁶⁰

CALLS.

122. If the time of payment of a subscription is fixed by the charter, statute, or subscription, no call is necessary to render the subscriber liable. But a call is essential to liability where it is expressly required by the charter, statute, or subscription, or, by the weight of authority, where the time of payment is left to the directors or stockholders. A call is not necessary after repudiation of the subscription.

123. Calls to be valid, must be made

(a) In the manner prescribed.

(b) By the person or board designated. If no person is designated, the power vests in the board of directors.

(c) And it must operate uniformly upon all the shareholders.

124. When the charter or subscription requires notice of assessments, the requirement must be complied with; but, in the absence of any such requirement, notice is not necessary. Proof of actual notice obviates objections to the form or manner of the notice.

125. Interest runs on assessments from the time they are payable.

²⁵⁶ *Carson v. Mining Co.*, 5 Mich. 288.

²⁵⁷ *Instone v. Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

²⁵⁸ *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435, 456. And see *Mandel v. Swan Land & C. Co.*, 154 Ill. 177, 40 N. E. 563, 27 L. R. A. 313, 45 Am. St. Rep. 124.

²⁵⁹ *Mills v. Stewart*, 41 N. Y. 384. And see *Allen v. American Building & L. Ass'n*, 49 Minn. 544, 52 N. W. 144, 32 Am. St. Rep. 574; *Carpenter v. American Building & L. Ass'n*, 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 845.

²⁶⁰ 1 Cook, Stock, Stockh. & Corp. Law, §§ 127, 128. See *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273.

Necessity for Call.

Where, by the charter, statute, or terms of the subscription itself, the subscription is payable immediately, or where it is payable at a stated time or times, or within a certain time, and that time has elapsed, no call is necessary to render the subscriber liable to an action thereon.²⁶¹ Where, however, the contract of subscription, or the charter, or statute, or articles of association, or a valid by-law existing at the time of subscription, which always form a part of the contract of subscription, expressly make the subscription payable on call by the directors or majority of the stockholders, the subscription does not become payable, and no action can be maintained upon it, until a valid call is made in accordance with the provision; and by the weight of authority the same rule applies where the charter and contract of subscription are silent as to the time of payment.²⁶² In New York

²⁶¹ Ruse v. Bromberg, 88 Ala. 619, 7 South. 384; New Albany & S. R. Co. v. Pickens, 5 Ind. 247; Phoenix Warehousing Co. v. Badger, 67 N. Y. 294.

²⁶² North & S. St. R. Co. v. Spullock, 88 Ga. 283, 14 S. E. 478; Glenn v. Howard, 65 Md. 40, 3 Atl. 895; Ruse v. Bromberg, 88 Ala. 619, 7 South. 384; Seymour v. Sturgess, 26 N. Y. 134; Banet v. Railroad Co., 13 Ill. 504; Spangler v. Railway Co., 21 Ill. 276; Holt v. Holt Electric S. Co. (C. C.) 79 Fed. 597; New England Fire Ins. Co. v. Haynes, 71 Vt. 306, 45 Atl. 221, 76 Am. St. Rep. 771. See Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288. In North & S. St. R. Co. v. Spullock, supra, a contract of subscription provided that the subscription should be paid "in such installments and at such times as may be decided by a majority of the stockholders or board of directors, or a trustee empowered for the purpose by a majority of the stockholders." In a suit on the subscription it was not shown that the stockholders, directors, or trustee had ever provided in what installments the subscription should be paid, or fixed any time or times for such payment, or made any call for payment; and it was therefore held that a judgment of nonsuit was proper. In Seymour v. Sturgess, supra, the by-laws of a corporation declared that no call for stock should be made, except upon the vote and by the direction of at least five of the directors. It was held that one who became a subscriber after the enactment of the by-law was entitled to the benefit of it, as it constituted a part of his contract, and that there was no liability on his subscription in the absence of such a call. In Glenn v. Howard, supra, the question arose whether recovery on a call for an unpaid subscription, which, by the terms of the charter, was payable "as required by the president and directors," not made until after discharge of the subscriber in bankruptcy, was barred by such discharge. The court held that if the call had been made before the discharge so as to become a debt provable in the bankruptcy proceedings, it would have been barred by the discharge, but that since there was no debt so provable before the call, and since the call was not made until after the discharge, it was not barred. Where it was provided that the directors might require payment of the sums subscribed at such times and in such proportions as they should deem best, but that no assessment should exceed \$10 on a share, it was held that the directors were not pre-

it is held, contrary to the weight of authority, that where the charter provides that the directors may require subscribers to pay the amount of their subscriptions "in such manner and in such installments as they may deem proper," and further provides for forfeiture of shares for nonpayment, the provision is designed to apply only to proceedings to forfeit shares, that the subscription is payable generally and unconditionally, and that no call is necessary before bringing suit on the subscription.²⁶³ No call is necessary after the subscriber has repudiated his subscription.²⁶⁴

Validity of Call.

Assessments and calls for unpaid subscriptions, to be valid, must be made in a proper manner, and by the proper authority. If the charter or an authorized by-law prescribes a particular mode for making them, that mode must be followed. So if it specifies who shall exercise the power, the provision must be regarded, and a call or assessment made by any other authority will be ineffectual.²⁶⁵ Generally, the power is conferred upon the board of directors, and when this is the case it must be exercised by them, and in their official capacity as a board. By the weight of authority, they cannot delegate the power to others,²⁶⁶ but it has been held that they may ratify an exercise of the power by others.²⁶⁷ Sometimes the power is conferred upon the whole body of shareholders. If the charter is silent as to who shall exercise the power, it will devolve upon the directors, since they are the proper persons to perform such corporate acts.²⁶⁸

Where calls are required to be made by the board of directors, the board, to make a valid call, must be legally constituted.²⁶⁹ It is not enough that the call is made by directors de facto, for the rule that

vented from laying several assessments, not exceeding \$10 each, by one vote. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

²⁶³ *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451, 463.

²⁶⁴ *Cass v. Railway Co.*, 80 Pa. 31.

²⁶⁵ *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Moses v. Tompkins*, 84 Ala. 613, 4 South. 763.

²⁶⁶ 1 Cook, *Stock, Stockh. & Corp. Law*, § 110; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Silver Hook Road v. Greene*, 12 R. I. 164; *Banet v. Railroad Co.*, 13 Ill. 504.

²⁶⁷ *Rutland & B. R. Co. v. Thrall*, *supra*; *Read v. Gas Co.*, 9 Helsk. (Tenn.) 545.

²⁶⁸ 1 Cook, *Stock, Stockh. & Corp. Law*, § 109; *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, *Cas. Corp.* 60.

²⁶⁹ *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Moses v. Tompkins*, 84 Ala. 613, 4 South. 763.

the acts of directors de facto cannot be questioned collaterally is only for the protection of third persons dealing with the corporation, and is not applicable as between the stockholders and the directors.²⁷⁰ To constitute a valid assessment, in the absence of any special requirement in the charter, all that is necessary is that there shall be some act or resolution of the directors, in their official capacity as a board, legally constituted, which shows a clear intention to render due and payable a part or all of the unpaid subscriptions.²⁷¹

A call, to be valid, must operate uniformly upon all the shareholders. One of them cannot legally be required to pay in a larger proportion of his subscription, or to pay at an earlier day, than the others, unless his contract expressly permits it.²⁷² Of course, the existence of debts against the corporation is not necessary to a valid assessment.²⁷³ Where several assessments have been made, the directors may abandon or waive one that is void, and sue for those that are valid.²⁷⁴ The necessity for a call on unpaid subscriptions is to be determined by the board of directors, when the power to make calls is vested in them, and the propriety of their determination on this point cannot be questioned by the shareholders.²⁷⁵ A subscriber may waive a call or informalities in making it.*

A call cannot be made, except for preliminary expenses,²⁷⁶ until the corporation is sufficiently organized to enter upon the transaction of

²⁷⁰ *Moses v. Tompkins*, 84 Ala. 613, 4 South. 763; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Schwab v. Frisco Mining & M. Co.*, 21 Utah, 258, 60 Pac. 940.

²⁷¹ *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60. Cf. *North Milwaukee Town-Site Co. v. Bishop*, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174.

²⁷² *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 47 N. W. 373, 24 Am. St. Rep. 698; *Pike v. Railroad Co.*, 68 Me. 445; 1 Mor. Corp. § 154; 1 Cook, Stock, Stockh. & Corp. Law, § 114. "But, if some shareholders," says Mr. Morawetz, "have already contributed more than others, it would be not only the right, but the duty, of the directors to make calls upon the other shareholders in such amounts as to equalize the contributions of all." 1 Mor. Corp. § 154.

²⁷³ *Penobscot R. Co. v. White*, 41 Me. 512, 68 Am. Dec. 257.

²⁷⁴ *Read v. Gas Co.*, 9 Heisk. (Tenn.) 545.

²⁷⁵ *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60; *Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994; *Nashua Sav. Bank v. Anglo-American Land Mortg. & A. Co.*, 189 U. S. 221, 18 Sup. Ct. 517, 47 L. Ed. 782; *Campbell v. American Alkali Co.*, 125 Fed. 207, 61 C. O. A. 317.

* *Graebner v. Post*, 119 Wis. 392, 96 N. W. 783, 100 Am. St. Rep. 890.

²⁷⁶ *Salem Milldam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232.

business, unless there is some express provision in the charter or contract of subscription authorizing it to be made before then, for until then it cannot be necessary. Thus, where a subscriber agreed to pay for his stock at such times and in such installments as the same might be called for by the corporation, and a statute declared that the corporation should not transact business until half of its capital stock should be subscribed, it was held that no call could be made until the condition of the statute should be fulfilled.²⁷⁷ It would be otherwise if no particular amount of stock were required to be subscribed before the corporation could begin operations.²⁷⁸

Notice and Demand.

Where the charter or subscription requires notice or demand as a condition precedent to suits to recover installments of stock, and there is no waiver of the condition, the prescribed notice must be given, or the prescribed demand made, or an action on a subscription cannot be maintained.²⁷⁹ But, in the absence of such a requirement, no notice or demand is necessary. The subscribers must take notice of the acts of the directors as to calls.²⁸⁰ Unless notice by publication is allowed by the charter or subscription, notice in a paper to which defendant is not a subscriber is not sufficient.²⁸¹ Nor would notice in any paper be sufficient unless it were shown that the subscriber read it, and so had actual notice. The fact that notice is not given in the way prescribed by the charter or statute, as by mail or publication, will not invalidate a call, if actual notice is shown. Proof of actual notice obviates all such objections.²⁸²

Interest.

An unpaid subscription bears interest from the time the subscriber is in default; that is, from the time he should pay the same. Where it is payable at once, and without call, interest commences to run at once.

²⁷⁷ *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232, collecting cases; ante, p. 299.

²⁷⁸ *Id.*

²⁷⁹ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Banet v. Railroad Co.*, 13 Ill. 504; *Spangler v. Railway Co.*, 21 Ill. 276; *North Milwaukee Town-Site Co. v. Bishop*, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174. Cf. *Nashua Savings Bank v. Anglo-American Land, Mtg. & A. Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782. As to the statute of limitations, post, p. —.

²⁸⁰ *Heaston v. Railroad Co.*, 16 Ind. 275, 79 Am. Dec. 430.

²⁸¹ *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451, 463.

²⁸² *Jones v. Sisson*, 6 Gray (Mass.) 288; *Schenectady & Saratoga Plank-Road Co. v. Thatcher*, 11 N. Y. 102. And see *Lexington & W. O. R. Co. v. Chandler*, 13 Metc. (Mass.) 311; *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654.

Where it is payable on call, interest runs from the time fixed for payment in the call.²⁸³ If notice of the assessment is required, interest runs, not from the date of the call, but from the time notice is given.²⁸⁴

ASSIGNMENT OF UNPAID SUBSCRIPTION.

126. Where liability on a subscription has become fixed by a valid call, or where no call is necessary, it may be assigned by the corporation like any other debt.

Where the whole amount of an unpaid subscription has been regularly called in by the corporation, it stands like any other liquidated demand, in favor of the corporation, and the debt may be assigned by the corporation, even before judgment, to the same extent as it could assign any other debt.²⁸⁵ The assignment, in such a case, like all assignments of choses in action, is subject to equities, and cannot deprive the debtor of any rights as a stockholder which he would possess if no assignment had been made.²⁸⁶ Where a subscription is made payable without the necessity for a call, it may be assigned at any time.

RELEASE AND DISCHARGE OF SUBSCRIBER.

127. A subscriber may be released in whole or in part from his contract by the corporation with the consent of all the other shareholders; but he cannot withdraw and surrender his shares without the consent of the corporation; nor can he do so with the consent of the corporation, unless the other subscribers consent; nor can he do so with the consent both of the corporation and the other subscribers, if the amount due from him is required to pay corporate debts.

128. Violation of or noncompliance with its charter by a corporation, whereby its charter has become subject to forfeiture, does not release a subscriber.

²⁸³ Gould v. Town of Oneonta, 71 N. Y. 298; Hawkins v. Citizens' Real Estate & I. Co., 38 Or. 544, 64 Pac. 320; McCoy v. World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; Jackson Fire & M. Ins. Co. v. Walle, 105 La. 89, 29 South. 503; May v. Ullrich, 132 Mich. 6, 92 N. W. 493. So, where the comptroller of the currency orders the receiver of a suspended national bank to collect unpaid subscriptions, interest runs from the date of the order. Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307.

²⁸⁴ Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115. Interest is not recoverable on a note given to pay for stock when the note does not so provide, and there is no agreement to pay it, and no call has been made. Seattle Trust Co. v. Pitner, 18 Wash. 401, 51 Pac. 1048.

²⁸⁵ Wells v. Rodgers, 50 Mich. 294, 15 N. W. 462.

²⁸⁶ Id.

129. Alteration or amendment of the charter of a corporation by the legislature with the corporation's consent, will release a dissenting subscriber, except
- (a) Where the amendment is immaterial, as regards its effect on the contract between the subscriber and the corporation.
 - (b) Where it is authorized by a provision in the charter or in a general law.
130. Abandonment of its business and franchises by a corporation will release a subscriber.
- (a) If the abandonment is complete and final, and
 - (b) If no rights of creditors intervene.
131. A subscriber is released by forfeiture of his stock to the corporation for nonpayment of assessments, but not by a sale of his shares to pay assessments, where, under the charter, he is liable for any deficiency.
132. A subscriber is released by a valid transfer of his shares, whereby the transferee takes his place, and assumes his liability as a shareholder.

Withdrawal and Release—Reduction of Shares.

We have, in another place, considered the right of a subscriber to revoke or withdraw his subscription before it is accepted by the corporation, and we have seen that the right of revocation exists until such acceptance, except where the subscription is a step authorized by statute in the process of forming the corporation.²⁸⁷ We come now to the question whether a subscriber whose offer has been accepted by the corporation, so as to create a contract, can withdraw, and thereby avoid liability on his subscription. It is clear that he cannot do so without the consent of the corporation,—the other party to the contract. He cannot, merely by announcing his withdrawal, or withdrawal in part, from the company, and surrendering his shares, or some of them, absolve himself from liability or further liability on his subscription.²⁸⁸ It follows that an assignment of his stock or a part of it to a fictitious person will not release him.²⁸⁹ And he cannot withdraw from his contract, or reduce his shares, even with the consent of the corporation, if the other subscribers do not consent; nor can he withdraw or reduce his shares by virtue of an agreement between him and the corporation, made at the time of subscribing, for the corporation has no power to make such an agreement with a subscriber either at the time of subscribing or afterwards. Such an agreement would be a fraud upon the other subscribers.²⁹⁰ A subscriber may, however, withdraw en-

²⁸⁷ Ante, p. 264.

²⁸⁸ Ante, p. 266; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344.

²⁸⁹ *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120, 42 Am. Dec. 191.

²⁹⁰ *Melvin v. Insurance Co.*, 80 Ill. 446, 22 Am. Rep. 199; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Hughes v. Manufacturing Co.*, 34 Md.

tirely, and surrender his shares, or reduce the number of shares subscribed for, with the consent both of the corporation and of the other shareholders, if in doing so he inflicts no injury upon the creditors of the corporation.²⁹¹ But he cannot be permitted to do so after debts have been incurred which there are no means to pay other than the capital stock subscribed, for the capital stock, as against creditors, cannot be squandered or given away.²⁹² And where a subscriber is sued by a creditor or receiver of the corporation on his original subscription, and claims in defense that the number of his shares was reduced, or that he withdrew, it is incumbent on him to show that it was at a time when it might lawfully be done.²⁹³ Even if a subscriber can claim a discharge on the ground that he offered to pay for his stock, and the officers of the corporation refused to receive payment, or to issue him a certificate, he cannot do so unless he treats it as a discharge. If he does not so treat it, but continues active in the company's business until it becomes insolvent, he will be liable.²⁹⁴

316, 330; *Gill v. Ballis*, 72 Mo. 432; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Cartwright v. Dickinson*, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; *Jackson Fire & M. Ins. Co. v. Walle*, 105 La. 89, 29 South. 503; ante, 296.

²⁹¹ *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Scottish Security Co.'s Receiver v. Starkie*, Ky. 78 S. W. 455. The validity of the cancellation of a subscription to the stock of a corporation whose chief office is in the state is governed by its laws, though the incorporation was under the laws of another state. *Scottish Security Co.'s Receiver v. Starkie*, supra.

²⁹² *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 208, 1 Cumming, Cas. Priv. Corp. 824; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Bouton v. Dement*, 123 Ill. 142, 14 N. E. 62; post, p. 535. It is a good defense to an action by the receiver of a corporation against a stockholder for balance claimed to be due on his stock, that, after the time limited for payment under the call of the directors, the stockholders and the corporation, then a going concern, being in dispute over the amount due on the stock, both surrendered part of their claim, and he made a payment to it of a certain sum on agreement that it was to be in full of all claims on the stock; such a compromise being good against creditors of the corporation. *New Haven Trust Co. v. Nelson*, 73 Conn. 477, 47 Atl. 753.

²⁹³ *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74. An agreement with the corporation by which the subscriber paid to it less than the full amount of his subscription in full satisfaction is not a defense, when there is no consideration for the release. *World's Fair Excursion & Transportation Boat Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724. And see *United Growers Co. v. Elsner* (Sup.) 47 N. Y. Supp. 906.

²⁹⁴ *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135.

Violation of Charter by Corporation—Mismanagement by Officers and Agents.

Failure of a corporation, after it has been organized, to comply with the provisions of its charter, or acts done in excess of its powers and in violation of its charter, whereby the charter has become subject to forfeiture at the instance of the state, cannot be set up by a shareholder to defeat an action on his subscription, either by the corporation itself or by its creditors, for, as has been shown in a previous chapter, it is exclusively for the state to determine whether it will exercise its prerogative of forfeiting or annulling the charter.²⁹⁵ Nor does the mere mismanagement of the affairs of the corporation by its officers and agents warrant the withdrawal therefrom of stockholders, and the repudiation of the obligations assumed by them as such.²⁹⁶ The shareholders' remedy in such cases is by suit for injunction,²⁹⁷ or, in a proper case, by suit to hold the officers who are guilty of the wrongful acts liable to the corporation.²⁹⁸

Alteration or Amendment of Charter.

It is well settled that an amendment of the charter of a corporation subsequent to subscriptions to its capital stock, whereby the objects and purposes of the corporation are materially enlarged or changed, will release from liability a subscriber who does not assent thereto, though the corporation and the other shareholders consent, unless the amendment was authorized by some provision in the charter or in the general laws.²⁹⁹ In *Proprietors of Union Locks and Canals v. Towne*,³⁰⁰ the original charter of a corporation empowered it to render the Merrimack river navigable between certain points, and for that purpose to purchase land, not exceeding six acres, and to collect tolls for forty years not averaging over twelve per cent. on the capital in-

²⁹⁵ Ante, p. 235; *Mississippi, O. & Red River R. Co. v. Cross*, 20 Ark. 443; *Central Plank-Road Co. v. Clemens*, 16 Mo. 359; *Agricultural Branch R. Co. v. Winchester*, 18 Allen (Mass.) 29; *Little v. O'Brien*, 9 Mass. 423; *Taggart v. Railroad Co.*, 24 Md. 563, 89 Am. Dec. 760; *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, *W. D. Smith, Cas. Corp.* 63, *Shep. Cas. Corp.* 28; *Milford & Chillicothe Turnpike Co. v. Brush*, 10 Ohio, 111, 36 Am. Dec. 78; *Cravens v. Mills Co.*, 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; *McCoy v. World's Columbian Exposition*, 87 Ill. App. 605, affirmed 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288.

²⁹⁶ *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434, 67 N. W. 493, *Oldham v. Mt. Sterling Co.*, 103 Ky. 529, 45 S. W. 779.

²⁹⁷ Ante, p. 164; post, p. 375.

²⁹⁸ Post, p. 375.

²⁹⁹ *Proprietors of Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; 1 *Cumming, Cas. Priv. Corp.* 894; *Middlesex Turnpike Corp. v. Locke*, 8 Mass. 268; ante, p. 203; post, p. 434.

³⁰⁰ 1 N. H. 44.

vested. After the defendant had subscribed for shares, an amendatory act was passed, on the petition of the corporation, abolishing all limitation upon the amount and duration of the toll collected, and authorizing the corporation to purchase and hold one hundred acres of land. The defendant did not assent to this alteration, and it was therefore held that he was not liable on his subscription. By his subscription it was said, in effect, the defendant entered into a special contract with the corporation, the terms of which contract were limited by the specific provisions, rights, and liabilities, detailed in the act of incorporation; and, to make a change in this contract, the assent of both parties was indispensable.³⁰¹

An act altering the charter of a corporation, and accepted by the corporation, does not release a dissenting subscriber from liability on his subscription, where the corporation has been enjoined from proceeding under the amendment, at the suit of another dissenting shareholder, and has, in effect, abandoned the act, and proceedings under it.³⁰²

If alteration or amendment of the charter is authorized by a provision therein or in the general laws, as explained in another chapter,³⁰³ this provision is a part of the subscriber's contract, and an alteration or amendment in accordance with the provision will not discharge him from liability.³⁰⁴ And it is well settled that a subscriber will not be discharged by immaterial alterations or amendments, though there is considerable diversity of opinion as to what alterations are immaterial.³⁰⁵ It is held in some states that a subscriber will not be discharged by a material alteration made in order to facilitate the execution of the object for which the corporation was originally established, and which is beneficial to him, or clearly not prejudicial. As to this, however, there is much diversity of opinion. The question is considered in treating of the power of the corporation to bind dissenting stockholders.³⁰⁶

Loss or Abandonment of Business, Property, or Franchises by Corporation.

Abandonment of its business, property, or franchises by a corporation will release a subscriber from further liability on his subscrip-

³⁰¹ This subject will be considered at some length in a subsequent chapter, where we shall call attention to points on which the decisions are in conflict. See post, p. 434.

³⁰² Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

³⁰³ Ante, p. 212.

³⁰⁴ Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336, 348; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Nugent v. Supervisors, 19 Wall. 241, 22 L. Ed. 83; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Schenectady & Saratoga Plank-Road Co. v. Thatcher, 11 N. Y. 102.

³⁰⁵ Post, p. 434.

³⁰⁶ Post, p. 434.

tion, where there are no debts for the payment of which unpaid subscriptions must be enforced. But such abandonment is no defense where it is sought to enforce subscriptions for the benefit of creditors.⁸⁰⁷ To release a shareholder, the abandonment must be complete and final, and no rights of creditors must intervene. In *McMillan v. Railroad Co.*⁸⁰⁸ it was therefore held that a subscriber to stock in a railroad company was not released from liability on his subscription by the facts that the company had suspended operations on its road, that it would require large additional expenditure of money and labor to complete its construction, and that the means of the company were wholly inadequate to accomplish its object. "The defendant," it was said, "could only be absolved from liability for the payment of his stock by alleging and proving a final abandonment of the work by the company, and also that its payment was not necessary for the purpose of satisfying any existing demand against the corporation."

Mere delay in prosecuting the work for which the corporation was organized is not an abandonment, and will not discharge subscribers. Thus the mere failure of a railroad company to complete its road and extend it to the terminus named in the charter will not release a subscriber on the ground that it has abandoned the completion of its road, where there has been no formal or legal abandonment of that part of the road.⁸⁰⁹

It is well settled that neither the failure of a railroad company to complete its road nor the nonuser of a part of it constitutes a defense to a suit on a subscription to its capital stock, unless such failure or nonuser violates some condition to that effect expressed in the subscription.⁸¹⁰ A shareholder is not released from liability for his unpaid subscription by the fact that the property and franchises of the corporation have been sold under foreclosure of a mortgage thereon, for the unpaid subscriptions continue part of the assets of the corporation for the benefit of all the stockholders and of creditors.⁸¹¹ Clearly, a sale of its property by a railroad company or other corporation, under a power conferred upon it by the provisions of its charter or of a law in force at the time of a subscription, does not release a subscriber, for such provisions form a part of his contract.⁸¹²

Forfeiture of Shares.

A subscriber, who has forfeited his shares for nonpayment of assessments, where the charter provides for a forfeiture, and not merely for

⁸⁰⁷ *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

⁸⁰⁸ 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

⁸⁰⁹ *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294.

⁸¹⁰ *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

⁸¹¹ *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294.

⁸¹² *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897.

a sale which will leave him liable for a deficiency, is released from any further liability, either to the corporation or to its creditors. Upon such a forfeiture he ceases to be a shareholder for any purpose. This question has been considered in a previous section.⁸¹³

Transfer of Shares.

Shares of stock are transferable by the holder without the consent of the other shareholders or of the corporation; and the effect of the transfer, provided it is valid, so that the transferee takes the transferor's place, and assumes his liability, is, in most jurisdictions, to release the transferor from any further liability as a shareholder. This question will be dealt with more at length in a subsequent section.⁸¹⁴

ESTOPPEL OF SUBSCRIBER.

133. A person who subscribes for stock in a corporation, and takes part in its organization or management, is generally estopped to deny the validity of his subscription.

We have seen in a previous chapter that one who subscribes for stock in a corporation after its organization or attempted organization is estopped to deny its corporate existence, and to say that it has not been legally organized, for the purpose of defeating an action on his subscription; since by contracting with the alleged corporation he admits its corporate existence.⁸¹⁵ We have also seen that this rule has no application to one who subscribes for stock previous to and in anticipation of incorporation, and who has not, by his subsequent acts acquiesced in the mode of incorporation, but that in such a case it is an implied condition of his subscription that the proposed corporation shall be legally and regularly organized; and, if it is not, he may set it up as a defense to a suit on his subscription.⁸¹⁶ If, however, a subscriber to stock in a corporation to be formed takes active part in its organization, or in its management after organization, he cannot be heard to say that it was not legally organized when sued upon his subscription either by the corporation or by its creditors.⁸¹⁷ These questions all relate to estoppel to deny the legality of organization and existence of the corporation.

A subscriber may also be estopped to deny the validity of his subscription. It may be laid down as a general rule that one who subscribes for stock in a corporation, and takes part in its organization

⁸¹³ Ante, p. 309.

⁸¹⁴ Post, p. 397.

⁸¹⁵ Ante, p. 92, and note, p. 43.

⁸¹⁶ Id.

⁸¹⁷ Id.

or management, cannot defeat an action on his subscription by showing that in subscribing he failed to comply with the formalities prescribed by the charter or by statute, or that the subscription was for any other reason invalid.²¹⁸

²¹⁸ Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; President, etc., of Centre & K. Turnpike R. Co. v. M'Conaby, 16 Serg. & R. (Pa.) 140; Nickum v. Burekhardt, 30 Or. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822; Blien v. Rand, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618.

CHAPTER XL

MEMBERSHIP IN CORPORATIONS (Continued).

- 134. Right of Members to Inspect Books and Papers of Corporation.
- 135. Right to Vote at Meetings.
- 136-137. Profits and Dividends.
- 138-140. Increase of Capital Stock.
- 141. Shareholders' Right to Preference.
- 142-145. Preferred Stock.
- 146-148. Watered and Bonus Stock.
- 149-151. Action by Stockholders for Injuries to Corporation—Interference in Management.
- 152. Expulsion of Members.

RIGHT OF MEMBERS TO INSPECT BOOKS AND PAPERS OF CORPORATION.

- 134. A stockholder has the right to inspect the books and papers of the corporation, either personally or by an agent, provided he does so for a proper purpose, and at a proper time. And, if the right is denied him, it may be enforced by a writ of mandamus either to the corporation or to the custodian of the books and papers; or the stockholder may maintain an action for any damages sustained.**

It is well settled in this country that any stockholder* of a corporation is entitled to inspect the books and papers of the company for proper purposes and at proper times; and, if the right is wrongfully denied him by the corporation or its officers, he may in a proper case maintain an action for any damages which he may have sustained thereby,¹ or he may enforce his right by petition for a writ of mandamus to compel the corporation or the officer having charge of the books and papers to permit an inspection,² or he may sue for the pen-

* The person demanding inspection must be a stockholder at the time. *State v. Whitad & Wheeler*, 104 La. 125, 28 South. 922.

¹ *Legendre v. Association*, 45 La. Ann. 669, 12 South. 837, 40 Am. St. Rep. 243. The error of the secretary in refusing to permit inspection is not of itself ground for damages against the corporation. *Legendre v. Association*, *supra*. Cf. *Fuller v. Alex Hollander Co.*, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456. An action for damages lies against the officers. *Bourdette v. Seward*, 52 La. Ann. 1333, 27 South. 724; *Id.*, 107 La. 258, 31 South. 630.

² *Lyon v. Screw Co.*, 16 R. I. 472, 17 Atl. 61; *Huyler v. Cattle Co.*, 40 N. J. Eq. 892, 2 Atl. 274; *People v. Throop*, 12 Wend. (N. Y.) 183; *Cockburn v. Bank*, 13 La. Ann. 289; *Foster v. White*, 86 Ala. 467, 6 South. 88; *Stone v. Kellogg*,

alty where one is prescribed by statute.³ The writ may issue against the officer having the custody of the books, on his refusal to allow an inspection, and the corporation is not a necessary party.⁴

In the case of a partnership, every partner has an absolute and unrestricted right to examine the books and papers of the firm; but the right of stockholders of a corporation in this respect is not unlimited.⁵ By the weight of authority, at common law, the court will not issue a writ of mandamus to compel the corporation to allow an inspection, unless the petitioner shows some good reason for making an examination. The writ will not be issued to enable a stockholder to make an examination for the purpose of accomplishing purely personal or speculative ends, nor will it be issued "at the caprice of the curious or suspicious";⁶ but the petitioner must show a specific and a proper purpose.⁷ This rule, said the Rhode Island court, sufficiently protects the stockholder in all his substantial rights,

165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240; *In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *State v. Pacific Brewing & M. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; *Fuller v. Alex Hollander Co.*, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456; *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123. The court may compel officers of a national bank in liquidation on expiration of its charter to exhibit books, papers, and assets to the stockholders. *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761. As to cases where equity will grant relief, see *Coquard v. National Linseed Oil Co.*, 171 Ill. 180, 49 N. E. 563; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Maeder v. Buffalo Bill's Wild West Co. (C. O.)* 132 Fed. 280. In Ohio the remedy is by injunction. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707.

³ *Lewis v. Brainerd*, 53 Vt. 519, *Shep. Cas. Corp.* 179, *W. D. Smith, Cas. Corp.* 86.

⁴ *Swift v. State*, 7 Houst. 338, 6 Atl. 856; *People v. Throop*, 12 Wend. (N. Y.) 183; *Foster v. White*, 86 Ala. 467, 6 South. 88; *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566.

⁵ See *Lyon v. Screw Co.*, *supra*.

⁶ *Com. v. Iron Co.*, 105 Pa. 111, 51 Am. Rep. 184.

⁷ *Lyon v. Screw Co.*, *supra*; *People v. Lake Shore & M. S. R. Co.*, 11 Hun, 1, affirmed in *Re Sage*, 70 N. Y. 220; *Com. v. Iron Co.*, *supra*; *Phoenix Iron Co. v. Com.*, 113 Pa. 563, 6 Atl. 75; *State v. Einstein*, 46 N. J. Law, 479; *Appeal of Empire Pass. Ry. Co.*, 134 Pa. 237, 19 Atl. 629. "The right," said the Pennsylvania court, "is not to be exercised to gratify curiosity, or for speculative purposes, but in good faith, and for a specific, honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as a stockholder." *Phoenix Iron Co. v. Com.*, *supra*. In *Appeal of Empire Pass. Ry. Co.*, *supra*, it was held that mandamus would not lie to compel a corporation to allow a stockholder to make a list of the other stockholders, in order that they might be induced to join him in a suit which he proposed to institute against the corporation, and to share with him the expense of such suit. It must appear that the right which the relator seeks to exercise is germane to his status as a stockholder. *O'Hara v. National Biscuit Co.*, 69 N. J. Law, 198, 54 Atl. 241.

and at the same time prevents an undue interference with the company in the conduct of its affairs. If a stockholder shows no good cause for a writ of mandamus, he is not injured by its refusal, and a company should not be hampered by frivolous and vexatious demands by one who may have secured stock in hostility to its interests.⁸ A stockholder showing a prima facie case of fraud, and for the purpose of obtaining information to enable him to file a bill to obtain relief against the fraud, is entitled to an inspection.⁹ And the mere fact that he is hostile to and on bad terms with the officers of the corporation does not deprive him of the right.¹⁰ But a stockholder has no right of inspection where his purpose in making the examination is improper, or hostile to the interests of the corporation. Thus it has been held that not even a director of a corporation has the right to examine its letter files for the purpose of making memoranda for the benefit of a new and rival company in the organization of which he is interested, and that the secretary, in forcibly taking them from him, is not guilty of an assault and battery.¹¹

It has been said, in effect, that a stockholder is entitled to inspection, though his only object is to ascertain whether the affairs of the corporation have been properly conducted by the directors or managers, and that he need not first show that there has been mismanagement, or even that there are grounds for suspecting it.¹² By the better opinion, however, mere suspicion, without grounds therefor, does not entitle him to a writ of mandamus.¹³

The right of inspection need not be exercised by the stockholder personally; but may be exercised by an agent, as by a clerk, or an attorney, or an expert accountant. The right is personal in the sense that only a stockholder possesses and can enjoy it, but the inspection

⁸ *Lyon v. Screw Co.*, supra.

⁹ *Phoenix Iron Co. v. Com.*, 113 Pa. 563, 6 Atl. 75.

¹⁰ *Huyler v. Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

¹¹ *Hemingway v. Hemingway*, 58 Conn. 443, 19 Atl. 766. See, also, *In re Coats* (Sup.) 76 N. Y. Supp. 730; *People v. Keeseville, A. C. & L. C. R. Co.* (Sup.) 94 N. Y. Supp. 555.

¹² "Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained in some way without the books that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right, in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the record of their transactions as trustees for the stockholders." *Huyler v. Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274, 278. See, also, *State v. Pacific Brewing & M. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707.

¹³ See cases cited in note 7, supra.

and examination may be made by another for him; otherwise it would often be unavailing.¹⁴

Often the right of inspection is expressly given by statute or by constitution, or by the charter or by-laws of the corporation, and under some provisions the right is broader than at common law. In Alabama the Code declares that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records, and papers of the corporation, at reasonable and proper times." There are similar statutes in other states. Under such a statute it was held by the Alabama court in a late case that any stockholder has an absolute right of inspection, subject only to the express limitation that the right shall be exercised at reasonable and proper times, and to an implied limitation that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In other respects the right is absolute. "The shareholder is not required to show any reason or occasion rendering an examination opportune or proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them as such."¹⁵

Sometimes, by statute, a corporation is made liable to a penalty for refusal to allow a stockholder to inspect its books, and officers or agents who are guilty of such refusal are subjected to a criminal prosecution. No damage need be shown to entitle a stockholder to recover the penalty, for it is imposed as a punishment for the violation of duty, and its recovery is not dependent upon any pecuniary loss.¹⁶

¹⁴ *Foster v. White*, 86 Ala. 467, 6 South. 88; *State v. Oil Works*, 28 La. Ann. 204; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; *State v. Citizens' Bank*, 51 La. Ann. 426, 25 South. 318 (executrix).

¹⁵ *Foster v. White*, 86 Ala. 467, 6 South. 88. For other cases in which the right was expressly given, in absolute terms, by a statute, or by the charter or by-laws, see *Cotheal v. Brouwer*, 5 N. Y. 562; *People v. Steamship Co.*, 50 Barb. (N. Y.) 280; *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566; *Winter v. Baldwin*, 89 Ala. 483, 7 South. 734. See, also, *Cobb v. Lagaarde*, 129 Ala. 488, 30 South. 326; *Stone v. Kellogg*, 165 Ill. 192, 46 N. W. 220, 56 Am. St. Rep. 240; *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 South. 814; *Weinenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; *Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156. The statute applies to national banks. *Winter v. Baldwin*, *supra*.

¹⁶ *Kelsey v. Fermentation Co.*, 51 Hun, 636, 3 N. Y. Supp. 723. The right to recover the penalty for such refusal is not waived by subsequently calling again, and making an examination. *Id.* The refusal must be willful. *Lozier*

RIGHT TO VOTE AT MEETINGS.

135. A stockholder has a right to vote at corporate meetings.

This right will be considered at length when we come to treat of the management of the corporation, and of stockholders' meetings.

PROFITS AND DIVIDENDS.

136. A dividend is a fund which the corporation has set apart from its profits to be divided among its members.

137. The chief rules in relation to profits and dividends are as follows:

- (a) A stockholder has no legal right to a share of the profits of the corporate business until a dividend is declared.**
- (b) But when a dividend is lawfully and fully declared, he acquires, as against the corporation, an absolute legal right to his share; and the declaration of the dividend cannot be revoked.**
- (c) A dividend can lawfully be declared only out of the surplus or net profits. The capital cannot be distributed.**
- (d) Whether a dividend shall be declared, even where there are profits, rests within the sound discretion of the directors; and they will be controlled in the exercise of this discretion at the suit of stockholders, only where they abuse it, and act fraudulently, oppressively, or unreasonably.**
- (e) All who are stockholders at the time the dividend is declared are entitled to share therein in proportion to their stock, without regard to when the dividend was earned, or when they became stockholders; and the directors cannot discriminate between them.**
- (f) It is generally for the directors to determine how and when the dividend shall be payable.**
 - (1) They may make it payable in money or in property. If no mode of payment is specified, it is payable in lawful money.**
 - (2) They may pay it by issuing new stock, when authorized to increase the capital stock, and thus retain the surplus in the business. This is called a stock dividend.**
- (g) The corporation may set off against his share of the dividend a debt due by the owner of stock at the time it is declared.**
- (h) When a dividend has been declared,**
 - (1) A stockholder may maintain assumpsit against the corporation as for money had and received.**
 - (2) Or, in some cases, he may sue in equity.**
 - (3) Demand is necessary before suit.**
 - (4) Interest and the statute of limitations begin to run from the time of demand.**
 - (5) Mandamus will not lie to compel payment.**

v. Saratoga Gas, E. L. & P. Co. (Sup.) 69 N. Y. Supp. 247. See, also, Kirkman v. Carlstadt Chemical Co. (Sup.) 74 N. Y. Supp. 865; Cox v. Paul, 175 N. Y. 328, 67 N. E. 586.

- (i) **Before a dividend has been declared**
 - (1) **No action, as for a debt, can be maintained by a stockholder to recover a share of the profits.**
 - (2) **But he may maintain a suit in equity to compel the corporation to declare and pay a dividend if it is wrongfully withheld.**
 - (3) **Mandamus is not a proper remedy.**
- (j) **If a dividend is wrongfully declared and paid, when there are no surplus profits,**
 - (1) **The directors are not personally liable to the corporation or to creditors in the absence of a statute, if they acted in good faith, and without negligence.**
 - (2) **But they are liable if they acted fraudulently or negligently.**
 - (3) **The property or funds wrongfully distributed may be followed and recovered by the corporation or by creditors in the hands of any one who is not an innocent purchaser or recipient for value.**

If the business of a corporation is successful, and profits are realized, it sets apart from time to time, from these profits, a fund to be divided among its members in proportion to the amount of their shares. This fund is called a dividend. The term, as applied to corporate stock, has a technical, but well understood, meaning. It indicates "corporate funds derived from the business and earnings of the corporation, appropriated by a corporate act to the use of and to be divided among the stockholders."¹⁷ "Dividends" and "profits" are not synonymous terms. Dividends are paid out of the profits, but they can exist only where they have been declared or set apart by the directors out of the profits. Profits are not dividends until, as expressed in the above quotation, they are "appropriated by a corporate act" to be divided among the shareholders. In *Hyatt v. Allen*¹⁸ the plaintiff sold to the defendant stock in a corporation, reserving "all profits and dividends of and upon such stock" up to a certain time. A dividend having been partly earned before the time specified, but not declared until afterwards, it was held that the plaintiff was not entitled to any part of it under the reservation in the contract, for there was no dividend until it was declared.

Until dividends are declared, the surplus profits are part of the assets of the company, and do not belong to the stockholders individually, nor is there any debt due from the corporation to them, even though the circumstances are such that a dividend ought to be declared.¹⁹

¹⁷ *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449.

¹⁸ 56 N. Y. 553, 15 Am. Rep. 449.

¹⁹ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Beveridge v. Railroad Co.*, 112 N. Y. 1, 19 N. E. 489, 496, 2 L. R. A. 648; *Scott v. Fire Co.*, 7 Paige (N. Y.) 198; *Phelps v. Bank*, 26 Conn. 269; *Hill v. Mining Co.* (Mo.) 21 S. W. 508.

It follows that, where a corporation becomes insolvent before its surplus fund has been set apart for the stockholders by declaring a dividend, the surplus, as well as the capital stock, must, if necessary, be applied to satisfy its debts, to the exclusion of any claim by the stockholders.²⁰ So, until a dividend has been declared, the stockholders cannot maintain an action against the corporation to recover their proportion of a surplus as a debt, their remedy being by suit in equity to compel the directors to declare and pay a dividend.²¹

It was said in an Alabama case that "dividends unpaid are assets of the company and liable for its debts,"²² but this is not true if the dividend has been declared and set apart. It is only true of surplus profits not set apart. When the directors of a corporation have lawfully declared a dividend from profits earned and received, the right of the stockholders to payment becomes vested, and there is a debt due them from the corporation; or, if money or other property equal to the amount of the dividend is specifically set apart as a fund appropriated to the payment of the dividend, the share of each stockholder therein is thereby severed from the common funds of the corporation, and becomes his individual property.²³ When a dividend is declared, the right of the stockholders thereto becomes vested, and the board of directors cannot afterwards, without their consent, revoke its action in declaring the dividend, and refuse to pay it.²⁴ Nor can insolvency of the corporation arising after the dividend has been declared and set apart defeat the right of the stockholders to their shares as against creditors.²⁵ To give the shareholders a vested right therein, the dividend must have been fully declared. Therefore it has been held in a late Massachusetts case that, where the fact that a dividend has been voted by the directors is not made public, nor communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded.²⁶

²⁰ Scott v. Fire Co., 7 Paige (N. Y.) 198.

²¹ Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Beveridge v. Railroad Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; post, p. 339, and cases there cited.

²² Curry v. Woodward, 44 Ala. 305.

²³ Beers v. Spring Co., 42 Conn. 17; King v. Railroad Co., 29 N. J. Law, 82; Le Roy v. Insurance Co., 2 Edw. Ch. (N. Y.) 657; In re Le Blanc, 14 Hun (N. Y.) 8, 75 N. Y. 598; Ford v. Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462; Wheeler v. Sleigh Co. (C. C.) 39 Fed. 347, 2 Cumming, Cas. Priv. Corp. 203; Re Severn-Wye & Severn Bridge Co., 74 Law Times (N. S.) 219; Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480.

²⁴ Beers v. Spring Co., 42 Conn. 17. Cf. Albany Fertilizer & F. I. Co., 103 Ga. 145, 29 S. E. 695.

²⁵ Le Roy v. Insurance Co., 2 Edw. Ch. (N. Y.) 657; In re Le Blanc, 14 Hun (N. Y.) 8.

²⁶ Ford v. Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462.

When Dividend May be Declared.

There are varying statutory or constitutional provisions in a number of states expressly restricting the right to pay dividends. Thus it is provided in some states that no dividend shall be paid except out of net profits properly applicable thereto, and which shall not in any way impair or diminish the capital; or except from surplus profits, arising from the business of the corporation; or if the payment of it will leave insufficient funds to meet the liabilities of the corporation, or will diminish the amount of its capital stock, etc. The object of these provisions is to prevent a corporation from paying dividends when there are no available funds, and to prevent it from impairing its capital by distributing any part of it among the stockholders. The statutes generally impose penalties on the directors for violating their provisions to which they are not liable at common law; but the principle upon which they are based, and the prohibition which they express, are fully recognized by the common law. Even at common law, dividends can lawfully be declared only out of the surplus or net profits.

The terms "net profits" or "surplus profits" mean that which remains as the clear gain of the corporation after deducting the capital invested, the expenses incurred, and the losses sustained.²⁷ As a rule, dividends cannot be declared out of borrowed money, for borrowed money is not profits;²⁸ but money might be borrowed temporarily for the purpose of paying dividends, if the corporation has used its current profits to make improvements for which it might have borrowed money.²⁹

"Profits" consist of earnings actually received. It has, therefore, been held that interest accrued, but not payable, and interest accrued, but not paid, though secured by safe mortgages, and drawing interest, are not "surplus profits," within the meaning of a statute prohibiting a corporation from paying dividends except from surplus profits.³⁰

The capital stock of an insurance company is not the primary fund for the payment of losses which may accrue upon existing risks, but premiums received for insurance and the interest on the capital stock constitute the primary and natural fund for the payment of the debts and losses of the company. Therefore the unearned premiums received by an insurance company on which the risks are still running

²⁷ *Park v. Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162; *Main v. Mills*, 6 Blss. 98, Fed. Cas. No. 8,974. See *Miller v. Bradish*, 69 Iowa, 278, 28 N. W. 594; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915.

²⁸ *Davis v. Mining Co.*, 2 Utah, 74, 88.

²⁹ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44.

³⁰ *People v. San Francisco Sav. Union*, 72 Cal. 199, 13 Pac. 498.

are not surplus profits of the company, out of which dividends can be legally declared, without leaving a sufficient surplus on hand to meet the probable losses upon risks then assumed and not yet terminated, independent of the capital stock of the company.³¹

In deciding whether a dividend was rightfully or wrongfully made, the transaction must be viewed from the standpoint of that time, and not in the light of subsequent events. Notes or overdrafts, for instance, by persons then considered perfectly solvent, should not be considered as losses because they afterwards proved to be such.³²

The directors of a corporation cannot lawfully diminish the capital required to enable the corporation to do business, either by directly distributing a part of it among the stockholders, or by indirectly doing so by distributing funds as dividends when there are no surplus profits. It would be a fraud upon creditors of the corporation, who deal with it on the faith of its capital stock, to divert the same by distribution among the stockholders as a dividend.³³ Though a corporation may agree to pay interest on certificates of stock paid in, if it is paid out of the surplus profits,³⁴ an agreement to pay interest cannot be enforced where the corporation has no means or resources from which payment can be made, except its capital stock.³⁵ It would seem clear that if land in which the capital of a corporation is invested, or a part of it, is taken under the power of eminent domain, the money received as compensation therefor will take the place of the land as part of the capital, and cannot be distributed as dividends.³⁶ A sum paid in on capital stock does not become profit, and liable to distribution as profits, on the stock being forfeited for nonpayment of the balance due thereon.³⁷

In the case of a mining corporation, the profits subject to distribution are the net proceeds of its mining operations, without any deduction for decrease in value of the mine by reason of the ore being taken out. And the same principle applies to all corporations organized for the purpose of utilizing a wasting property,—a prop-

³¹ *De Peyster v. Insurance Co.*, 6 Paige (N. Y.) 486; *Scott v. Fire Co.*, 7 Paige (N. Y.) 198; *Lexington Life, Fire & Marine Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165. Indeed, it was held in the case last cited that the safest and only allowable principle to act upon in such cases is to exclude such premiums altogether from the computation of profits.

³² *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974.

³³ See *Reid v. Manufacturing Co.*, 40 Ga. 98, 104, 2 Am. Rep. 563; *Wood v. Dummer*, 3 Mason, 808, Fed. Cas. No. 17,944, and 1 Cumming, Cas. Priv. Corp. 805; post, p. 549.

³⁴ *McLaughlin v. Railway Co.*, 8 Mich. 100.

³⁵ *Painesville & H. R. Co. v. King*, 17 Ohio St. 534.

³⁶ See *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687.

³⁷ *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 187.

erty that can be used only by consuming it,—as a mine, a lease, or a patent. Such a corporation is not to be considered as having distributed its capital merely because it has distributed the net proceeds of its operations, though the value of the property constituting its capital is necessarily thereby decreased.³⁸ Except in such cases, however, before profits can lawfully be set apart and paid out as a dividend, a proper sum must be set aside to represent the wear and tear upon the plant and property of the corporation, so that a fund will be created for the purpose of repairing and renewing the property when it shall become necessary.³⁹

Where a corporation reduces its capital stock under statutory authority, it cannot distribute among the stockholders an amount equal to the difference between the original capital stock and the reduced capital stock, without regard to the present value of its property. The reduced amount becomes the amount which it is bound to provide as capital, and which it is prohibited from depleting by payments to stockholders. It must therefore retain property actually equal in value to the amount of the reduced capital over and above its debts. If it does this, and a surplus remains, this may lawfully be distributed among the stockholders.⁴⁰

Discretion of the Directors as to Declaring Dividend.

When a corporation has a surplus, whether a dividend shall be declared, and, if declared, how much it shall be, and when and where it shall be payable, rests largely in the discretion of the directors; and in the exercise of their discretion they will not be controlled or

³⁸ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44. See *Bond v. Barrow Haematite Steel Co.* [1902] 1 Ch. 353.

³⁹ *Davison v. Gillies*, 16 Ch. Div. 347, note, 2 Cumming, Cas. Priv. Corp. 223; *Dent v. Tramways Co.*, 16 Ch. Div. 344, 2 Cumming, Cas. Priv. Corp. 225.

⁴⁰ *Seeley v. Bank*, 8 Daly, 400, 78 N. Y. 608; *Strong v. Railroad Co.*, 93 N. Y. 426. "The surplus, if any, which a corporation reducing the amount of its capital, under the act of 1878, is at liberty to pay to its stockholders, must, in every case, be ascertained, and depends upon the result of an examination into its affairs, and not upon the difference between the original amount of capital and the reduced amount; and whenever, by sales of property, or by means of earnings, or otherwise, the corporation comes in possession of funds which are in excess of the reduced amount fixed as capital, it can distribute that amount without violating any law." *Strong v. Railroad Co.*, *supra*. A corporation, on reducing its capital stock, may distribute a portion of its assets and retain the balance as its property. When the surplus is invested in stock of railway companies, the stock itself may be distributed. *Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274, 57 Atl. 876. The right to unpaid stock dividends does not pass with an assignment of the shares. *Redhead v. Iowa Nat. Bank*, 127 Iowa, 572, 103 N. W. 796.

interfered with by the courts, unless they act fraudulently, oppressively, or unreasonably.⁴¹ The stockholders of a corporation are not entitled, as a matter of absolute right, to the payment of a dividend whenever the earnings of the corporation in any year exceed its liabilities. Though there may be a large surplus, the board of directors may, if, in their opinion, the interests of the corporation make it necessary or advisable, expend the same in improvements, or in extending the business of the corporation, if the business as extended is within its powers; or may, under some circumstances, retain it as a surplus fund, instead of dividing it among the stockholders. And whether they will do so is generally for them to decide.⁴²

Directors will not be allowed to abuse their discretion as to declaring dividends, and to use their power illegally, wantonly, or oppressively. They must act reasonably and in good faith. If the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it.⁴³

⁴¹ Post, p. 339; *Williams v. Telegraph Co.*, 93 N. Y. 162, 192, 2 Cumming, Cas. Priv. Corp. 209; *Hunter v. Roberts, Throp & Co.*, 83 Mich. 63, 47 N. W. 131; *Jackson's Adm'rs v. Plank-Road Co.*, 31 N. J. Law, 277, 2 Cumming, Cas. Priv. Corp. 201; *Belfast & M. L. R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362, 366; *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 7 Sup. Ct. 309, 30 L. Ed. 363, 2 Cumming, Cas. Priv. Corp. 228, W. D. Smith, Cas. Corp. 88, Shep. Cas. Corp. 188; *Wolfe v. Underwood*, 96 Ala. 329, 11 South. 344; *Beveridge v. Railroad Co.*, 112 N. Y. 1, 19 N. E. 489, 12 L. R. A. 648; *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17; *Morey v. Fish Bros. Wagon Co.*, 108 Wis. 520, 84 N. W. 862; *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905; *S. Jarvis Adams Co. v. Knapp (C. C.)* 135 Fed. 1008; and cases hereafter cited.

⁴² *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363, 2 Cumming, Cas. Priv. Corp. 228, W. D. Smith, Cas. Corp. 88, Shep. Cas. Corp. 188; *Pratt v. Pratt, Read & Co.*, 33 Conn. 446, 2 Cumming, Cas. Priv. Corp. 219; *Smith v. Manufacturing Co.*, 29 Ala. 503; *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363; *McNab v. McNab & H. Mfg. Co.*, 16 N. Y. Supp. 448, 62 Hun, 18, affirmed 133 N. Y. 687, 31 N. E. 627. Directors are not required to declare dividends on common stock, as well as on preferred, when there are profits enough therefor, where it is not for the interest of the corporation, though such profits may afterwards be absorbed by dividends on the preferred stock. *Stevens v. United States Steel Corp.*, 68 N. J. Eq. 373, 59 Atl. 905.

⁴³ *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499, 2 Cumming, Cas. Priv. Corp. 241; *Belfast & M. L. R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362, 367; *Pratt v. Pratt, Read & Co.*, 33 Conn. 446, 2 Cumming, Cas. Priv. Corp. 219; *Beers v. Spring Co.*, 42 Conn. 17; *Scott v. Fire Co.*, 7 Paige (N. Y.) 198; *Storrow v. Texas Consolidated C. & M. Co.*, 87 Fed. 612, 31 C. C. A. 139; *Griffing v. A. A. Griffing Iron Co.*, 61 N. J. Eq. 269, 48 Atl. 910. Where the officers of a close manufacturing corporation, whose stock has no recognized market

Who are Entitled to Dividends.

The profits of a corporation are to be distributed pro rata among those who are its stockholders at the time when the dividend is declared, no matter when the profits may have been earned, and without regard to the length of time particular members may have been stockholders. This is well settled.⁴⁴ And it is also well settled that the directors in declaring dividends have no right to discriminate between stockholders, unless the contract under which particular shares were issued gives them the right.⁴⁵ "The dividends must be general on all the stock, so that each stockholder will receive his proportionate share. The directors have no right to declare a dividend on any other principle. They cannot exclude any portion of the stockholders from an equal participation in the profits of the company."⁴⁶

A person who becomes a stockholder without limitations in his contract, even immediately before a dividend is declared, is entitled to share therein, and the directors cannot exclude him. In *Jones v. Terre Haute & Richmond R. Co.*⁴⁷ the plaintiff, who held bonds of the defendant corporation, by their terms convertible into stock, surrendered them, and received stock therefor. Shortly afterwards the directors declared a dividend. It was held that the plaintiff was entitled to his proportionate share, and that the board of directors could not discriminate against him.

A stockholder in a corporation has no legal title to a share in the profits until a dividend is declared. Until then a transfer of his shares will carry with it the right to share in the profits already earned, and

value, vote increases in their salaries while pursuing a policy of expanding the business by the use of the profits for that purpose, to the exclusion of dividends, a court of equity has power to compel the restoration of excessive amounts so withdrawn, and to adjust the salaries to a reasonable basis. *Raynolds v. Diamond Mills Paper Co.* (N. J. Ch.) 60 Atl. 941; post, p. 340.

⁴⁴ *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758; *March v. Railroad Co.*, 43 N. H. 515; *Jones v. Railroad Co.*, 57 N. Y. 196; *Boardman v. Railway Co.*, 84 N. Y. 157; *Hill v. Newichawanick Co.*, 8 Hun, 459, 71 N. Y. 593; *Phelps v. Bank*, 28 Conn. 269; *Clark v. Campbell*, 23 Utah, 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716. "This rule," says Morawetz, "is based on reasons of convenience, amounting almost to a necessity. It would be practically impossible to apportion the earnings of a corporation, whose shares are constantly changing hands, so as to give each holder a proportionate part of the profits earned while he was owner of the shares." 1 Mor. Corp. § 162.

⁴⁵ *Jones v. Railroad Co.*, 57 N. Y. 196; *Ryder v. Railroad Co.*, 13 Ill. 510; *Stoddard v. Foundry Co.*, 34 Conn. 542; *Hill v. Mining Co.* (Mo. Sup.) 21 S. W. 508; *Redhead v. Iowa Nat. Bank*, 127 Iowa, 572, 103 N. W. 796.

⁴⁶ *Ryder v. Railroad Co.*, supra. Where the directors, in declaring a dividend, wrongfully except a particular stockholder, the exception is void and of no effect. *Hill v. Mining Co.*, supra.

⁴⁷ 57 N. Y. 196.

dividends subsequently declared will belong to the transferee.⁴⁸ It is otherwise with a dividend declared before the transfer, but not paid. In the absence of a special agreement to the contrary, it belongs to the transferor, and does not pass by the transfer; and the fact that the dividend is payable at a future day, or that no time for payment is fixed, can make no difference.⁴⁹ So a legatee of shares is not entitled to a dividend thereon declared before, but payable after, the death of the testator. The dividend forms part of the corpus of the estate and passes to the executor.⁵⁰ So, where the owner of stock by will directs the income of his estate to be paid to his widow, and dies after a dividend has been declared, but before it is payable, the dividend goes to the executors as part of his estate, and is not payable to the widow as income.⁵¹

Where, by the terms of a certificate of stock, the shares are transferable only on the books of the company, the corporation will be protected by a payment of dividends to the person who appears on the books as the owner of shares, if it has no notice of any transfer, and will not be liable after such payment to a person to whom the shares were transferred before the dividends were declared, but who neglected to have the transfer entered on the books.⁵² If the corporation has notice of the transfer, it will be liable to the transferee or his assignee for dividends subsequently declared, though the transfer is not registered, and an action may be maintained against it therefor without suing to compel it to register the transfer.⁵³ The pledgee of stock, whose

⁴⁸ Post, p. 399; Boardman v. Railway Co., 84 N. Y. 157, 177; Jermain v. Railway Co., 91 N. Y. 483; Phelps v. Bank, 26 Conn. 269; March v. Railroad Co., 43 N. H. 515; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412. But, if the purchaser of stock fails to comply with his contract to purchase, he loses the right, not only to the stock, but also to dividends declared after the sale. Phinlzy v. Murray, 83 Ga. 747, 10 S. E. 358, 6 L. R. A. 426, 20 Am. St. Rep. 342. The right to dividends not yet declared need not be separately assigned. It passes as an incident to the stock. See the cases above cited,—particularly, Boardman v. Railway Co., supra. And see Kaufman v. Woolen Mills Co., 93 Va. 673, 25 S. E. 1003; Louisville & N. R. Co. v. Hart County, 116 Ky. 186, 75 S. W. 288, 77 S. W. 361.

⁴⁹ Wheeler v. Sleigh Co. (C. C.) 39 Fed. 347, 2 Cumming, Cas. Priv. Corp. 203; Hill v. Newichawanick Co., 8 Hun, 459, 71 N. Y. 593; Hopper v. Sage 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771; In re Kernochan, 104 N. Y. 618, 11 N. E. 150; Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732. Contra, Burroughs v. Railroad Co., 67 N. C. 376, 12 Am. Rep. 611.

⁵⁰ De Gendre v. Kent, L. R. 4 Eq. 283; Wheeler v. Sleigh Co., supra.

⁵¹ In re Kernochan, 104 N. Y. 618, 11 N. E. 150.

⁵² Post, p. 406; Brisbane v. Railroad Co., 94 N. Y. 204, W. D. Smith, Cas. Corp. 94, and Shep. Cas. Corp. 177; Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483.

⁵³ Robinson v. Bank, 95 N. Y. 637, 2 Cumming, Cas. Priv. Corp. 157; Hill v. Mining Co. (Mo. Sup.) 21 S. W. 508; Gemmell v. Davis, 75 Md. 546, 23 Atl.

name appears on the books of the corporation, or whose rights are known to the corporation, is entitled to dividends subsequently declared, as between himself and the corporation, and the corporation will be liable to him therefor if it pays them to the pledgor.⁵⁴

How Payable.

If there is no statutory or charter requirement that dividends shall be paid in cash, it is within the discretion of the directors whether they shall be made payable in cash, or in property, or whether they shall declare a stock dividend when authorized to increase the capital stock.⁵⁵ If a dividend is made payable in cash, or payable generally, the corporation becomes a debtor, and must discharge the debt, as it is bound to discharge all its other debts, in lawful currency.⁵⁶

Stock Dividends.

Where a corporation has the power to increase its capital stock, and has assets from which it may legally declare a dividend, it may, if its interests so require, hold back such assets, and issue stock therefor, instead of distributing the assets among the stockholders by declaring a dividend payable in money.⁵⁷ This is called a stock dividend. Such a dividend, if stock is issued only to the extent of the surplus profits, and the amount paid in as the capital stock of the corporation remains, is not a violation of the prohibition against reducing or withdrawing the capital stock by distribution among stockholders.⁵⁸

Set-Off against Debt Due to Corporation.

A corporation may retain dividends, and apply them upon debts due to it from stockholders at the time the dividend is declared.⁵⁹ This

1032, 32 Am. St. Rep. 412; Central Nebraska Nat. Bank v. Wilder, 32 Neb. 454, 49 N. W. 369; Guarantee Co. of North America v. East Rome Town Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150; Armour v. Town Co., 98 Ga. 458, 25 S. E. 504; Ashton v. Zella Min. Co., 134 Cal. 408, 66 Pac. 494.

⁵⁴ Boyd v. Worsted Mills, 149 Pa. 363, 24 Atl. 287. See, also, as to the right of a pledgee of stock to dividends: Fairbank v. Bank, 132 Ill. 120, 22 N. E. 524; Central Nebraska Nat. Bank v. Wilder, 32 Neb. 454, 49 N. W. 369; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412; Guarantee Co. of North America v. East Rome Town Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150; Armour v. Town Co., 98 Ga. 458, 25 S. E. 504; Hunt v. Laconia & L. St. Ry. Co., 68 N. H. 561, 39 Atl. 437; George A. Barse L. S. C. Co. v. Range Valley C. Co., 16 Utah, 59, 50 Pac. 630.

⁵⁵ Williams v. Telegraph Co., 93 N. Y. 162, 192, 2 Cumming, Cas. Priv. Corp. 209.

⁵⁶ Williams v. Telegraph Co., 93 N. Y. 162, 192, 2 Cumming, Cas. Priv. Corp. 209; Scott v. Banking Co., 52 Barb. (N. Y.) 45; Ehle v. Bank, 24 N. Y. 548.

⁵⁷ Williams v. Telegraph Co., 93 N. Y. 162, 2 Cumming, Cas. Priv. Corp. 209.

⁵⁸ Williams v. Telegraph Co., *supra*.

⁵⁹ Bates v. Insurance Co., 3 Johns. Cas. (N. Y.) 238; Sargent v. Insurance Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Hagar v. Bank, 63 Me. 509.

right does not rest upon any idea that the corporation has a lien, but it is the right of set-off, for the dividend is a simple debt owing by the corporation to the stockholder.⁶⁰ If shares are assigned, and notice of the assignment is given to the corporation before the dividend is declared, the right to the dividend passes to the assignee, and the corporation cannot set off a debt to it from the assignor, incurred before the assignment.⁶¹ In New York it has been held that the corporation may exercise this right of set-off if the debt became due before notice of the assignment was given, though the dividend may not have been declared until after such notice.⁶²

Remedies of Stockholders.

As has been seen, a dividend lawfully set apart from the surplus profits of a corporation becomes thereupon the individual property of the stockholders, to be received by them on demand. It is a severance from the common funds of the company of so much for the use and benefit of each stockholder in his individual right. If, upon demand by a stockholder, the corporation refuses to pay him his share, he may maintain an action against it for money had and received to his use;⁶³ or, according to some of the cases, by a suit in equity.⁶⁴ If no time is fixed for payment of the dividend, but it is made payable at such time as may be directed by the board of directors, it is to be paid within a reasonable time; and if the board refuses to pay, or fix a time for payment, a stockholder may enforce his rights in equity.⁶⁵ If the directors of a corporation, in making a distribution of dividends, omit to apportion a quota thereof to certain shares of stock, the owner of such shares may maintain assumpsit against the corporation for breach of the contract which the law implies from the relationship of the parties, that an equal distribution of dividends will be made.⁶⁶ A demand is necessary after a dividend has been declared, before an action can be brought by a stockholder against the corporation to recover his share.⁶⁷

⁶⁰ *Gemmell v. Davis*, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

⁶¹ *Gemmell v. Davis*, *supra*.

⁶² *Bates v. Insurance Co.*, *supra*.

⁶³ *King v. Railroad Co.*, 29 N. J. Law, 82, 87; *West Chester & P. R. Co. v. Jackson*, 77 Pa. 321, 328.

⁶⁴ *Le Roy v. Insurance Co.*, 2 Edw. Ch. (N. Y.) 657; *Beers v. Spring Co.*, 42 Conn. 17.

⁶⁵ *Beers v. Spring Co.*, 42 Conn. 17.

⁶⁶ *Jackson's Adm'rs v. Newark Plank-Road Co.*, 31 N. J. Law, 277, 2 Cumming, Cas. Priv. Corp. 201; *Hill v. Mining Co.* (Mo.) 21 S. W. 508.

⁶⁷ *Hagar v. Bank*, 63 Me. 509; *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363, 387; *Bank of Louisville v. Gray*, 84 Ky. 565, 2 S. W. 168. Where a corporation refuses to pay a stockholder a dividend, a demand is not a condition precedent to the maintenance of an action. *Redhead v. Iowa Nat. Bank*, 127 Iowa, 572, 103 N. W. 796.

And it follows that interest and the statute of limitations run from the time demand is made, and only from that time.⁶⁸

The remedy of a stockholder who is wrongfully excluded from his right to share in a dividend is against the corporation.⁶⁹ He cannot follow the assets of the company into the hands of other stockholders, to whom dividends have been paid, and maintain an action against them for money had and received.⁷⁰

An action cannot be maintained against a corporation by a stockholder for a dividend, as for a debt due, until the dividend has been declared, though there may be funds from which it is the duty of the directors to declare a dividend. "A right to a dividend from the profits of a corporation is no debt until the dividend is declared. Until that time the dividend is only something that may possibly come into existence, but the obligation on the part of the corporation to declare it cannot be treated as the dividend itself."⁷¹

If the directors unreasonably and wrongfully refuse or neglect to declare dividends when there are surplus profits out of which they may be declared, and there is no good reason for withholding them, a stockholder may maintain a suit in equity to compel them to declare and pay them.⁷² Mandamus is not a proper remedy in such a case.⁷³ Nor will mandamus lie to compel the payment of a dividend after it has been declared.⁷⁴ It must be borne in mind in this connection that it is only in a clear case that the court will interfere with the discretionary powers of the directors by compelling them to declare a dividend.⁷⁵

⁶⁸ *State v. Baltimore & O. R. Co.*, supra; *Bank of Louisville v. Gray*, supra; *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128; *Cochran v. McGee* (Ky.) 53 S. W. 519. Cf. *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43. The statute begins to run from the time the dividend is payable. *Re Severn & W. & S. Bridge R. Co.* [1896] 1 Ch. 559; *Winchester & L. T. Co. v. Wickliffe's Adm'r*, 100 Ky. 531, 38 S. W. 806, 66 Am. St. Rep. 356. Cf. *In re Artizans' Land & M. Corp.* [1904] 1 Ch. 796.

⁶⁹ *Jones v. Railroad Co.*, 57 N. Y. 196.

⁷⁰ *Peckham v. Van Wagenen*, 83 N. Y. 40, 38 Am. Rep. 392.

⁷¹ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156, per Cooley, J. And see *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363; *Williston v. Railroad Co.*, 13 Allen (Mass.) 400; *Boardman v. Railway Co.*, 84 N. Y. 157; *Hill v. Mining Co.* (Mo.) 21 S. W. 508.

⁷² *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499, 2 Cumming, Cas. Priv. Corp. 241; *Pratt v. Pratt, Read & Co.*, 33 Conn. 446, 2 Cumming, Cas. Priv. Corp. 219; *Beers v. Spring Co.*, 42 Conn. 17; *Scott v. Fire Co.*, 7 Paige (N. Y.) 198; *King v. Governor, etc., of Bank of England*, 2 Barn. & Ald. 620, 2 Cumming, Cas. Priv. Corp. 218; ante, p. 334.

⁷³ *Rex v. Governor, etc., of Bank of England*, 2 Barn. & Ald. 620, 2 Cumming, Cas. Priv. Corp. 218.

⁷⁴ *People v. Central Car & Manuf'g Co.*, 41 Mich. 166, 49 N. W. 925.

⁷⁵ Ante, p. 334.

Remedies where Dividends are Unlawfully Paid.

If the directors or trustees act in good faith, and without negligence, they are not liable to the corporation or to creditors, at common law, for declaring and paying dividends when they should not have done so, and thereby diminishing the capital stock.⁷⁶ But if they have been guilty of a fraudulent breach of trust, or of gross negligence, in paying dividends when they had no right to pay them, they are personally liable to creditors.⁷⁷ Their liability under statutes will, of course, depend upon a construction of the statutes. Generally, they are not liable if they act in good faith, and without negligence.⁷⁸

If dividends are improperly declared and paid when there are no surplus profits, they may be reclaimed by the corporate creditors, or by a receiver or assignee acting for the benefit of the creditors.⁷⁹ In a Kentucky case it was held that dividends declared by the directors and received by the stockholders may be reclaimed by the directors if illegally declared under a misapprehension of the right to declare them, and that, if there be an assignment by the corporation to a trustee, such right to reclaim the dividends passes to the trustee if the terms of the assignment are sufficiently broad to embrace them.* In other cases the right of the receiver of a corporation as the representative of the creditors to recover unearned dividends paid to its stockholders out of the capital has been placed upon the ground that the capital is a trust fund for the benefit of creditors and that those to whom it has been refunded will be held trustees for their benefit.† In the Supreme Court of the United States, however, it has been held that the receiver of a national

⁷⁶ *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; *Stringer's Case*, L. R. 4 Ch. App. 475; post, p. 502.

⁷⁷ *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 195; *Scott v. Fire Co.*, 7 Paige (N. Y.) 198; post, p. 502.

⁷⁸ As to the liability under the New York statute, see *Rorke v. Thomas*, 56 N. Y. 559; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Van Dyck v. McQuade*, 86 N. Y. 38; post, p. 597.

⁷⁹ *Lexington Life, Fire & Marine Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165. And see *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 189, 191; *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974; *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263; *Minnesota Thresher Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310; *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263; *Grant v. Southern Contract Co.*, 104 Ky. 781, 47 S. W. 1091; *American Steel & Wire Co. v. Eddy*, 130 Mich. 266, 89 N. W. 652; *Cook, Corp.* § 548; 10 Cyc. 549.

* *Lexington Life, Fire & Marine Ins. Co. v. Page*, supra. See, also, *Grant v. Ross*, supra; *Bingham v. Marion Trust Co.*, 27 Ind. 247, 61 N. E. 29; *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875. Cf. *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 41, 46 N. W. 310.

† *Minnesota Thresher Mfg. Co. v. Langdon*, supra; 10 Cyc. 549.

bank cannot recover a dividend paid out of the capital, where the stockholder receiving it acted in good faith, believing it to be paid out of profits, and the bank was not then insolvent; the court holding that the theory of a trust fund had no application to such a case.† If the capital stock of a corporation is wrongfully paid away by the directors it may be pursued by creditors into the hands of any one who is not an innocent purchaser or recipient of the same for a valuable consideration.⁸⁰ If such a wrong is threatened, a creditor may maintain a bill in equity for an injunction.⁸¹

Same—Grants and Bequests of Income and Profits.

When the owner of stock grants or bequeaths the income and profits to a person for life or for a term of years, difficult questions arise as to the right to dividends. On some point the courts do not agree, while on others the law is well settled.

A grant or bequest of the income or profits of an estate including shares of stock, does not entitle the grantee or legatee to dividends declared upon the stock before the grant or will takes effect, though they may not be payable until afterwards. Therefore, where the owner of stock left a will, by which he empowered his executors "to receive the rents, interest, and income" of so much of his estate as was given them in trust, including shares of stock, and apply the same to the use of his widow during her life, it was held that a dividend declared on the stock before his death, but not payable until afterwards, formed part of the estate, and went to the executors as such, and was not payable to the widow as income. "As soon," it was said, "as the profits in shares of stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once forms part of his estate. The fact that they are made payable at a future time is immaterial. The dividend to which the life tenant may be entitled as income can only be that which the company may declare after that relation is acquired. In this case the

† McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 734, 43 L. Ed. 1022. And see Lawrence v. Greenup, 97 Fed. 906, 38 C. C. A. 546; New Hampshire Sav. Bank v. Richey, 121 Fed. 956, 58 C. C. A. 294; Great Western Min. & Mfg. Co. v. Harris, 128 Fed. 321, 63 C. C. A. 51. The receiver may recover dividends paid when the bank was actually insolvent. Hayden v. Thompson, 71 Fed. 60, 17 C. C. A. 592; Hayden v. Brown (C. C.) 94 Fed. 15; Hayden v. Williams, 96 Fed. 279, 37 C. C. A. 479.

⁸⁰ Gratz v. Redd, *supra*. And see Reid v. Manufacturing Co., 40 Ga. 98, 104, 2 Am. Rep. 563.

⁸¹ Reid v. Manufacturing Co., *supra*; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793; Coquard v. National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563.

dividend represented profits or income, but had become a debt before the will took effect.”⁸²

Perhaps by the weight of authority, dividends declared after the grant or bequest takes effect, though earned before, go to the grantee or legatee as income or profits.⁸³ In some states, however, the rule is otherwise; and it is held that: “When the stock of a corporation is by the will of a decedent given in trust, the incomes thereof for the use of a beneficiary for life, with remainder over, the surplus profits which have accumulated in the lifetime of the testator, but which are not divided until after his death, belong to the corpus of his estate; while the dividends of earnings made after his death are income, and are payable to the life tenant, no matter whether the dividend be in cash or script or stock.”⁸⁴ And, as a rule, dividends which come, not from earnings, but from capital, as from a sale of a part of the property, will be regarded as part of the corpus of the estate, and will go to the remainderman.⁸⁵

There is a direct conflict of opinion on the question whether, when a corporation, instead of declaring a dividend payable in cash, declares a stock dividend,—that is, a dividend payable in stock,—thereby increasing the capital stock, the new stock thus issued goes to the legatee or grantee of the income or profits, or forms part of

⁸² *In re Kernochan*, 104 N. Y. 618, 11 N. E. 150. And see *De Gendre v. Kent*, L. R. 4 Eq. 283; *Wheeler v. Sleigh Co. (C. C.)* 39 Fed. 347, 2 Cumming, Cas. Priv. Corp. 203. But see, contra, *Burroughs v. Railroad Co.*, 67 N. C. 376, 12 Am. Rep. 611; *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 720; *In re Bradreth's Estate (Sup.)* 72 N. Y. Supp. 333. A bequest of “dividends,” it has been held, passes a dividend declared before, but payable after, the testator's death. *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231.

⁸³ *King v. Follett*, 3 Vt. 385. And see *Appeal of Merchants' Fund Ass'ns*, 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894. But compare *Smith's Appeal*, *infra*.

⁸⁴ *Smith's Appeal*, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237. In this case it was held that, where shares of stock are bequeathed in trust to pay the income to a certain person for life, with remainder over, profits realized from a sale by the trustees of extra shares of stock issued after testator's death, to them and other stockholders, in lieu of corporate profits applied to the improvement of the corporate property during testator's lifetime, should be distributed as capital, and not as income. And see *Earp's Appeal*, 28 Pa. 368, where there was an apportionment between a life beneficiary and the corpus of the estate of new stock representing profits earned partly before and partly after the testator's death. See, also, *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959.

⁸⁵ *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687; *Vinton's Appeal*, 99 Pa. 434, 44 Am. Rep. 116; *In re Rogers*, 161 N. Y. 108, 55 N. E. 393; *Mercer v. Buchanan (C. C.)* 182 Fed. 501; *Brownell v. Anthony*, 189 Mass. 442, 75 N. E. 746; *Bulkeley v. Worthington Ecclesiastical Soc.*, 78 Conn. 526, 63 Atl. 531.

the corpus of the estate, so as to go to the remainderman.⁸⁶ In Massachusetts it is held that cash dividends, however large, unless from other sources than earnings,* are to be regarded as income, and go to the grantee or legatee of the income; and that stock dividends, however made, are to be regarded as an increase of the capital, and should be kept for the remainderman. In *Minot v. Paine*,⁸⁷—a leading case,—the income of a trust fund, which included shares of stock in a corporation, was payable to a person for life, the capital then to be conveyed to another. It was held that shares of additional stock distributed to the trustee as a dividend on the original shares were to be regarded as an increase of the capital to be kept for the remainderman, and not as income, although such shares represented net earnings of the corporation.⁸⁸ The same rule obtains in some other jurisdictions.⁸⁹ It is known as the “Massachusetts rule.” Whether the distribution by a corporation of its earnings among its stockholders is an apportionment of stock or a division of profits depends entirely upon the substance and intent of the action of the corporation, as shown by its votes. Even when, at the time of the creation of new shares to be distributed among the old stockholders, a dividend is declared in cash to the same amount, the thing received by each stockholder, whether in stock or in cash, is to be deemed capital, and not income, if such appears, upon a view of the whole action of the corporation, to be the real character of the transaction.⁹⁰ In *Rand v. Hubbell*⁹¹ a corporation voted to increase the number of shares of its capital stock, so as to allow each stockholder to increase the number of shares held by him by one-half, and commanded the directors to do whatever was required by law for that purpose. A vote of the directors, passed on the same day, de-

⁸⁶ See article, 19 Am. Law Rev. 737.

**Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687; *Gifford v. Thompson*, 115 Mass. 478. Cf. *Balch v. Hallet*, 10 Gray (Mass.) 402; *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Reed v. Heard*, 6 Allen (Mass.) 174.

⁸⁷ 99 Mass. 101, 96 Am. Dec. 705.

⁸⁸ And see *Atkins v. Albree*, 12 Allen (Mass.) 359, and cases cited below.

⁸⁹ *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, Shep. Cas. Corp. 194, where the question is considered at length, and the cases reviewed; *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; *Hotchkiss v. Quarry Co.*, 58 Conn. 120, 19 Atl. 521; *In re Brown*, 14 R. I. 371, 51 Am. Rep. 397; *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081; *Quinn v. Safe-Deposit & T. Co.*, 93 Md. 285, 48 Atl. 835, 53 L. R. A. 169; *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919; *Smith v. Dana*, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; *De Koven v. Alsop*, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587. See, also, *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025.

⁹⁰ *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Gibbons v. Mahon*, supra.

⁹¹ 115 Mass. 461, 15 Am. Rep. 121. Cf. *Davis v. Jackson*, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801.

clared that a dividend in cash should be payable to each stockholder at the time within which he was allowed by the vote of the corporation to take his new shares, and should be applied by him in payment for those shares, and directed the treasurer to issue such shares to old stockholders only. Each stockholder received a check for the amount of his dividend, and immediately exchanged the check for a certificate of the shares apportioned to the stock held by him. The checks were then destroyed. It was held that the stock thus issued constituted a stock dividend, and in the case of shares of old stock held by a trustee the new shares must be considered an addition to the capital of the trust fund. In favor of the Massachusetts rule, it is to be said that, although apparently arbitrary, it is easy of application.

In Pennsylvania and some of the other states the Massachusetts rule is not recognized, but it is held that, where a corporation declares a dividend out of the profits earned during the tenant's term, payable in additional shares, such shares go to the life tenant as income.⁹² "Where a corporation," said the Pennsylvania court, "having actually made profits, proceeds to distribute such profits among the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."⁹³ This has been called the "American rule."⁹⁴ In favor of this rule, it is to be said that, although difficult to apply, it works a just result.

In England the rule is that an ordinary or usual dividend, whether paid in cash or in stock or property, belongs to the life tenant, while an extraordinary cash or stock or property dividend belongs to the corpus of the estate.⁹⁵

⁹² Earp's Appeal, 28 Pa. 368; Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164; Appeal of Philadelphia Trust, Safe-Deposit & Ins. Co. (Pa. Sup.) 16 Atl. 734; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. And see Gilkey v. Paine, 80 Me. 319, 14 Atl. 205; Pritchett v. Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856; Simpson v. Millsaps, 80 Miss. 239, 31 South. 912; Lang v. Lang's Ex'r, 57 N. J. Eq. 325, 41 Atl. 705. In New York, while the Massachusetts rule is repudiated, and regard is had to the substance, and not the form, of the transaction, it seems that the life tenant is entitled to all dividends, whether stock or moneys, made out of profits, irrespective of whether they were earned during the tenant's term. McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Lowry v. Farmers' Loan & T. Co., 172 N. Y. 137, 64 N. E. 796. Cf. Chester v. Buffalo Car Mfg. Co. (Sup.) 75 N. Y. Supp. 428.

⁹³ Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164.

⁹⁴ 1 Cook, Stock, Stockh. & Corp. Law, §§ 554.

⁹⁵ 1 Cook, Stock, Stockh. & Corp. Law, §§ 556, 557, and cases there cited; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230.

Whether, on the death of a person entitled to the income and profits of shares of stock for life, a dividend declared after his death in part out of profits earned by the corporation during his life may be apportioned between his estate and the remainderman, is not clear. In some jurisdictions this may be done by statute, and in some it has been done independently of any statute.⁹⁷ By the weight of authority, however, in the absence of statutory provision, the whole of such a dividend goes to the remainderman.⁹⁸ According to the well-settled rule, the estate of the life tenant is entitled to a dividend declared during his life, though not payable until afterwards.⁹⁹

INCREASE OF CAPITAL STOCK.

138. A corporation cannot, directly or indirectly, increase its capital stock beyond the amount fixed by its charter, unless the power to do so is conferred upon it by the legislature. Any attempted increase, in the absence of legislative sanction, is absolutely void.
139. Where the power to increase its capital has been conferred upon a corporation, it must be exercised by vote of the stockholders, and not by the directors.
140. Where the stock of a corporation is increased, a person does not become a stockholder by merely subscribing therefor. He must pay for it.

A corporation having a fixed capital divided into a fixed number of shares has no power of its own volition, or by any act of its officers or agents, to enlarge its capital or increase the number of shares into which it is divided, unless such power is expressly conferred upon it by its charter, or by an authorized amendment thereof. The power must be conferred upon it by the legislature. Unless the power has been conferred upon it, every attempt to do so, either directly or indirectly, is void, and certificates issued in excess of the authorized capital are of no validity whatever.¹⁰⁰

Where the charter of a corporation authorizes it to increase its

⁹⁷ *Ex parte Rutledge*, 1 Harp. Eq. (S. C.) 65, 14 Am. Dec. 696. In this case a person who was entitled for life to dividends on certain bank stock, "to be paid half-yearly as they shall be received from the bank," died just before a semiannual dividend was declared. It was held that the dividend should be apportioned, and the part which had accrued at the time of his death paid to his executor.

⁹⁸ 1 Cook, Stock, Stockh. & Corp. Law, § 558; *In re Foote*, Appellant, 22 Pick. (Mass.) 299; *In re Connolly's Estate*, 198 Pa. 137, 47 Atl. 1125.

⁹⁹ *Ante*, p. 836.

¹⁰⁰ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 49. In this case an officer of a corporation fraudulently issued certificates of stock in excess of the authorized capital. It was held that such certificates were void, and

capital stock, the exercise of the power effects so great and radical a change in the constitution of the corporation that it must be exercised by the stockholders. It cannot be exercised by the board of directors without the consent of the stockholders, unless such authority is conferred by the charter, or in a subsequent enabling act; and such subsequent enabling act would not bind the stockholders without their acceptance of it.¹⁰¹

Where a corporation is fully organized, and increases its capital stock under power conferred by its charter, subscriptions to the new stock do not stand on the same footing as a subscription made prior to and for the purpose of effecting organization. The latter makes the subscriber a stockholder before it is paid. In the case of stock issued by a corporation after it has been organized, it is different. To constitute a subscriber for the new stock a stockholder, something more than the mere subscription is necessary. The stock must be paid for.¹⁰² The mere subscription to such stock, while it constitutes a valid contract on the part of the company to issue the stock to the subscriber upon his paying for it, and, on his part, to receive and pay for it, does not give him an interest in the company, nor vest in him the title to the stock.¹⁰³

If the stock of a corporation is increased without authority, and certificates thereof issued, the increase and the certificates are void, and can neither confer any rights, nor impose any liabilities upon the holders, except where the persons seeking to enforce the liability are bona fide creditors of the corporation, who relied upon the validity of the stock, and as against whom the holders of such stock would be estopped to deny its validity in order to escape liability.¹⁰⁴ If there was no power at all to increase the stock, creditors are chargeable with notice of the want of power, and cannot claim to have been misled, and therefore no estoppel will arise.¹⁰⁵ It is otherwise if

should be canceled at the suit of the corporation, but the corporation was held liable to persons defrauded thereby. See, also, *Einstein v. Rochester Gas & E. Co.*, 146 N. Y. 46, 40 N. E. 631; *Cooke v. Marshall*, 191 Pa. 315, 43 Atl. 814, 64 L. R. A. 413.

¹⁰¹ *Eldman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Chicago City Ry. Co. v. Allerton*, 18 Wall. (U. S.) 233, 21 L. Ed. 902; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; *Newport Cotton-Mill Co. v. Mims*, 103 Tenn. 465, 53 S. W. 736.

¹⁰² *Baltimore City Pass. Ry. Co. v. Hambleton*, 77 Md. 341, 26 Atl. 279; *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439.

¹⁰³ *St. Paul, S. & T. F. R. Co. v. Robbins*, *supra*.

¹⁰⁴ *Sayles v. Brown* (C. C.) 40 Fed. 8; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 49; *Veeder v. Mudgett*, 95 N. Y. 295.

¹⁰⁵ *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Ross-Meehan Brake S. Co. v. Southern Malleable I. Co.* (C. C.) 72 Fed. 957.

there was power to make the increase, but a failure to comply with the preliminaries prescribed by the statute.¹⁰⁶

SAME—SHAREHOLDERS' RIGHT TO PREFERENCE

141. The stockholders of a corporation are entitled to a preference over strangers, in proportion to their shares, in subscribing for an increase of the capital stock, and an action for damages will lie against the company if it deprives them of this right.

It is well settled that when the capital stock of a corporation is increased under a power conferred by its charter, each of the stockholders has the right to take a proportionate number of the new shares before they can be offered or issued to strangers. He may waive this right, but, if he does not, and is deprived of it, he may maintain an action against the company in assumpsit, and recover for the loss.¹⁰⁷ The measure of the damages to be recovered is the excess of the market value of the stock above the par value at the time of payment of the last installment, with interest on the excess.¹⁰⁸ This rule does not apply to original stock bought in by the corporation, or taken by it for debts due to it, and which is held as assets, and sold for the payment of liabilities, or for the general benefit.¹⁰⁹

¹⁰⁶ *Veeder v. Mudgett*, 95 N. Y. 295; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Peck v. Elliott*, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380. And see *Scott v. Deweese*, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822.

¹⁰⁷ *Gray v. Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Eldman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, collecting cases; *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 52 N. W. 568, 33 Am. St. Rep. 654; *State v. Smith*, 48 Vt. 266, 289; *Jones v. Concord & M. Ry.*, 67 N. H. 119, 38 Atl. 120; *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048; *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44. Cf. *Weidenfeld v. Northern Pac. Ry. Co.*, 129 Fed. 305, 63 C. C. A. 537. The directors may not provide that the new issue shall be sold to the one making the highest secret bid. *Electric Co. v. Edison Electric I. Co.*, 200 Pa. 516, 50 Atl. 164. And see *Hammond v. Edison Illuminating Co.*, 131 Mich. 79, 90 N. W. 1040, 100 Am. St. Rep. 582. Where the officers, directors, and majority of the stockholders of a corporation, acting in good faith for the benefit of the corporation, voted to accept a proposition to double its capital stock, and to sell all the shares of the new stock to the person making the proposition, for $4\frac{1}{2}$ times the par value of the shares, a dissenting stockholder, in the absence of statutory provisions, or conditions in the charter of the corporation, had no vested right to purchase at par a portion of such new stock proportionate to the amount of shares already held by him, and he could not recover damages for the failure of the corporation to so sell to him. *Stokes v. Continental Trust Co.* (Sup.) 91 N. Y. Supp. 239, 99 App. Div. 377.

¹⁰⁸ *Gray v. Bank*, supra.

¹⁰⁹ *State v. Smith*, 48 Vt. 266, 289; *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130.

PREFERRED STOCK.

- 142.** Preference or preferred shares of stock are shares which give the holders rights and privileges which are not given to the holders of common stock,—usually the prior right to dividends to a certain amount.
- 143.** A corporation may, in the absence of prohibition in its charter, provide for the issue of preferred stock, if it does so before any stock is issued; but, by the weight of authority, it cannot do so, in the absence of legislative authority, after common stock has been issued, without the consent of the holders of such common stock, as it would thereby interfere with their vested rights under their contracts.
- 144.** It has been held that the legislature may authorize a corporation to create preferred stock by amending the charter after common stock has been issued.
- 145.** The issue of preferred stock may take the form of a borrowing; but generally the subscribers or purchasers become stockholders, and not creditors, and they have the rights and are subject to the liabilities of stockholders. Thus:
- (a) Their dividends are payable only out of the net earnings applicable to the payment of dividends, and creditors are entitled to be first paid.
 - (b) They are subject to the statutory liability for corporate debts, if the corporation becomes insolvent.
 - (c) They are entitled to vote at stockholders' meetings, and to all the other rights of stockholders, except in so far as their contract may provide otherwise.

"Preferred stock" or "preference stock" is so called because the holders are given a preference of some sort over the ordinary stockholders. The ordinary stock is called "common stock." Generally, the preference consists in the right to receive dividends from the earnings of the company before the holders of the common stock can share in such earnings.¹¹⁰ Sometimes the payment of the dividend is guarantied, in which case the stock is called "guarantied stock."¹¹¹ Preferred stock is usually issued in order to raise money for corporate purposes instead of borrowing the money on bond and mortgage, and the preference is given to facilitate its disposal.

Power to Create Preferred Stock.

Sometimes the power to issue preferred stock is expressly conferred by the charter of a corporation.¹¹² Where the charter does not ex-

¹¹⁰ *Totten v. Tison*, 54 Ga. 139.

¹¹¹ *Gordon's Ex'rs v. Railroad Co.*, 78 Va. 501.

¹¹² *Belfast & M. L. R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362.

pressly give the power, and does not prescribe how the shares shall be issued, but leaves the question to be determined by the corporation, and to be fixed by by-laws or otherwise, and there is no statutory prohibition in the way, a corporation may, before offering its stock, provide by its by-laws for the issuing of preferred stock, and then offer its stock to the public for subscription. Subscribers would then know what to expect, and would contract and be bound accordingly.¹¹³ By the weight of authority, however, when this is not done, but, on the contrary, the stock is divided into equal shares, and is so subscribed for, no right to create preferred stock being reserved, the stockholders acquire a vested right under their contract to share equally in the earnings of the corporation, and in its property on dissolution; and this right cannot be impaired without their consent by the subsequent creation and issue of preferred stock, unless it is done under valid legislative authority.¹¹⁴

Some of the courts hold, and some seem to hold, that a corporation has the power to create and issue preferred stock on the ground that such a transaction is virtually a borrowing of money, and that corporations have the power to borrow money, and may do it in this way.¹¹⁵ But such a transaction cannot, in any sense, be regarded as

¹¹³ See *Kent v. Mining Co.*, 78 N. Y. 159; *Davis v. Proprietors of the Second Univ. Meetinghouse*, 8 Metc. (Mass.) 321; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826.

¹¹⁴ *Kent v. Mining Co.*, 78 N. Y. 159; *Campbell v. Zylonite Co.*, 122 N. Y. 455, 25 N. E. 853, 11 L. R. A. 596; *Ernst v. Elmira Municipal Imp. Co.* (Sup.) 54 N. Y. Supp. 116. Cf. *Wilcox v. Trenton Potteries Co.*, 64 N. J. Eq. 173, 53 Atl. 474; *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361. And see *Banigan v. Bard*, 134 U. S. 291, 10 Sup. Ct. 565, 33 L. Ed. 932. "Shares of stock are in the nature of choses in action, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened, against the will of the owner, than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right, or is properly derived afterwards from a superior lawgiver. The certificate of stock is the muniment of the shareholder's title, and evidence of his right. It expresses the contract between the corporation and its co-stockholders and himself; and that contract cannot, he being unwilling, be taken away from him, or changed as to him, without his prior dereliction, or under the conditions above stated." *Kent v. Mining Co.*, supra. Such a transaction, not being within the corporate powers of the company, is not binding upon one who holds stock under an unregistered assignment in blank as security for a debt, though consented to by the registered owner. *Campbell v. Zylonite Co.*, supra.

¹¹⁵ See *Hazelhurst v. Railroad Co.*, 43 Ga. 13. It was so held in *West Chester & P. R. Co. v. Jackson*, 77 Pa. 321, where it was said: "A corporation may issue new shares, and give them a preference, as a mode of borrowing money, where it has the power to borrow on bond and mortgage, as preferred stock is only a form of mortgage." In this case, however, provision was made

a borrowing, except, perhaps, where the preferred stock is issued as security merely, and is redeemable by the corporation.¹¹⁶ Nor can such a transaction be sustained under the power to make or alter by-laws, for "the power to make by-laws is to make such as are not inconsistent with the constitution and the law, and the power to alter has the same limit, so that no alteration could be made which would infringe a right already given and secured by the contract of the corporation."¹¹⁷

In several cases it has been held that an act of the legislature authorizing a corporation to issue preferred stock is valid, and not unconstitutional as impairing the obligation of the contracts between the corporation and existing stockholders, the issuing of preferred stock being regarded as a legitimate mode of raising money.¹¹⁸

Same—Laches and Estoppel of Stockholders.

Stockholders who do not consent to the creation of preferred stock must not be guilty of laches in raising objection. If the corporation, by vote of a majority of the stockholders, determines to issue preferred shares, and puts the shares on the market, or offers them on subscription, shareholders who do not consent must assert their rights without delay, so as to prevent injury to innocent third persons who may take the shares from the corporation or by transfer from subscribers. If, with knowledge of the action of the corporation, actual or constructive, they acquiesce for an unreasonable time, they will be held to have assented, and will not be heard to complain.¹¹⁹

A person who takes preferred stock in a corporation may be estopped to deny the validity of its issue as against creditors. In *Banigan v. Bard*,¹²⁰ for instance, it was held that the holder of preferred

for redemption of the stock, and attention was particularly called to this feature of the case by the court.

¹¹⁶ "The idea of a borrowing is not filled out unless there is in the agreement therefor a promise or understanding that what is borrowed will be repaid or returned,—the thing itself, or something like it, of equal value,—with or without compensation for the use of it in the meantime. * * * The transaction is not to be looked upon as other than a preference of one class of stockholders to another,—as giving to the first class a perpetual, inextinguishable, prior right to a portion of the earnings of the company before the other class might have anything therefrom." *Kent v. Mining Co.*, 78 N. Y. 159. The issue of preferred stock may take the form of a borrowing, as where the stock is made redeemable, and is issued, like a bond, merely as security. See *Totten v. Tison*, 54 Ga. 139; post, p. 354, notes 132-134.

¹¹⁷ *Kent v. Mining Co.*, 78 N. Y. 159; post, p. 440.

¹¹⁸ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, 545; *City of Covington v. Covington & Cincinnati Bridge Co.*, 10 Bush (Ky.) 69.

¹¹⁹ *Kent v. Mining Co.*, 78 N. Y. 159, where relief was held to be barred by a delay of four years.

¹²⁰ 134 U. S. 291, 10 Sup. Ct. 565, 33 L. Ed. 932, affirming 39 Fed. 18.

stock in a corporation issued without statutory authority, who was active in passing the resolution authorizing its issue, and who voluntarily subscribed and paid for it, and held it for 28 months, voting upon it, and using it to obtain control of the corporation's affairs, could not, upon the insolvency of the corporation, assert its invalidity, and recover the money paid for it. So it has been held that persons who receive preferred stock, and for several years accept the interest guarantied to be paid thereon, cannot raise the objection that the corporation had no power to issue the stock.¹²¹

Rights and Liabilities of Preferred Stockholders.

The rights of holders of preferred stock will depend upon the construction of their contract with the corporation.¹²² Generally, they are given the right to have dividends on their stock paid out of the earnings of the corporation before anything is paid to the holders of common stock. Sometimes they are given the right to certain dividends before payment of dividends on common stock, and, in addition to this, they are entitled to share in the remaining profits pro rata with the holders of the common stock.

Ordinarily, a preferred stockholder is not to be regarded as a creditor of the corporation. He is a stockholder like the holders of common stock, the only difference being that he is entitled to a preference over them.¹²³ "He cannot be both creditor and debtor, by virtue of his ownership of stock."* And it is well established that dividends on preferred stock are payable only out of the net earnings, which are applicable to the payment of dividends. They are not payable absolutely and unconditionally, but only out of profits made by the company. The preference is limited to profits whenever earned.¹²⁴ "A

¹²¹ *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. 495, 506, 27 L. Ed. 279. And see *Breslin v. Fries-Breslin Co.*, 70 N. J. Law, 274, 58 Atl. 313. Contra, *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

¹²² Of course, the charter and by-laws of the corporation in force at the time preferred stock is issued form a part of the contract between the corporation and holders of the preferred stock. See *Belfast & M. L. R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362; *Pronik v. Spirits Distilling Co.*, 58 N. J. Eq. 97, 42 Atl. 587.

¹²³ *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362; *Taft v. Railroad Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Williston v. Railroad Co.*, 13 Allen (Mass.) 400; *Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C.)* 82 Fed. 360; *People v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

* *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769. See, also, *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826.

¹²⁴ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Chaffee v. Railroad Co.*, 55 Vt. 110, W. D. Smith, Cas. Corp. 96; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Taft v. Railroad Co.*, 8 R. I. 310, 5 Am. Rep. 575;

dividend among preference stockholders exclusively is understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general."¹²⁵ Even a general guaranty of dividends on preferred stock is not a guaranty of payment in any event, but only in the event that dividends are earned.¹²⁶

If the contract with preferred stockholders merely provides that the preferred shares shall be entitled to a dividend of a certain per cent. annually when earned, the dividends are cumulative, and the arrearages of one year are payable out of the earnings of subsequent years.¹²⁷ But the dividends may be made dependent upon the profits of each particular year, and in such a case they would not be cumulative.¹²⁸ Ordinarily preferred stock is entitled to no preference over other stock in relation to capital; but where there is an express agreement giving such a preference, not prohibited by local law or by the charter, it is binding upon the common stockholders.†

St. John v. Railway Co., Fed. Cas. No. 12,226, affirmed 22 Wall. (U. S.) 136, 22 L. Ed. 743; *Williston v. Railroad Co.*, 13 Allen (Mass.) 400. Compare *Gordon's Ex'rs v. Railroad Co.*, 78 Va. 501. "An agreement to pay dividends on preferred stock out of the net earnings does not mean the net earnings of the corporation as it was when the preferred stock was issued. 'The corporation may, after the agreement, incur new obligations, which will diminish the net earnings applicable to such dividends.'" *St. John v. Railway Co.*, 22 Wall. (U. S.) 136, 22 L. Ed. 743, affirming Fed. Cas. No. 12,226; *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769, affirming *King v. Ohio & M. R. Co.* (C. C.) 2 Fed. 36. In *Dent v. Tramways Co.*, 16 Ch. Div. 344, 2 Cumming, Cas. Priv. Corp. 225, a corporation had unlawfully paid dividends for several years without setting apart a fund to provide for repairs and renewals by reason of wear and tear. Afterwards they sought to make up this fund out of the profits of the current year, instead of paying dividends on preferred stock, which was entitled to dividends out of the profits of the particular year only. It was held that this could not be done.

¹²⁵ Per Cooley, J., in *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156,

¹²⁶ *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Railroad Co.*, 8 R. I. 310, 5 Am. Rep. 575, and cases there cited; *Williston v. Railroad Co.*, 13 Allen (Mass.) 400; *Field v. Lamson & G. Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136.

¹²⁷ *Henry v. Railway Co.*, 3 Jur. (N. S.) 1133; *Boardman v. Railway Co.*, 84 N. Y. 157; *Hazeltine v. Railroad Co.*, 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 830; *Jermain v. Railway Co.*, 91 N. Y. 483. And see *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Cotting v. Railroad Co.*, 54 Conn. 156, 5 Atl. 851.

¹²⁸ *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363, 2 Cumming, Cas. Priv. Corp. 228, W. D. Smith, Cas. Corp. 88, Shep. Cas. Corp. 188.

† *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155.

If the payment of dividends on preferred stock is made dependent upon the profits of each particular year, "as declared by the board of directors," the holders of such stock are not entitled of right to dividends payable out of the net profits accruing in any particular year, unless the directors formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging, in the first instance, to the directors to determine with reference to the condition of the company's property and affairs as a whole. The circumstances may justify them in expending money on improvements instead of declaring a dividend.¹²⁹

Being stockholders, the owners of preferred shares are subject to all the liabilities of stockholders, including the statutory liability for corporate debts.¹³⁰

The ownership of preferred stock, as a general rule, carries with it the right to vote upon the same at any meeting of the holders of the capital stock. But to this rule there may be exceptions. It is competent for a corporation in issuing certificates of preferred stock to stipulate therein that the holders shall not be entitled to vote the same at stockholders' meetings, and the stipulation will be binding upon them.¹³¹

Preferred stock may be issued in such a way, and under such terms, as to make the transaction strictly a borrowing; and the holders of the stock may therefore become creditors of the corporation, and not stockholders.¹³² In such a case the dividends might be payable, like

¹²⁹ *New York, L. E. & W. R. Co. v. Nickals*, supra, reversing (C. O.) 15 Fed. 575. While it is largely a matter of discretion with the directors whether to declare a dividend, the court will not allow them to oppress holders of preferred stock by refusing to declare a dividend when the profits and nature of the business clearly warrant a dividend. *Storrow v. Texas Consolidated C. & M. Ass'n*, 87 Fed. 612, 31 C. C. A. 139.

¹³⁰ *Railroad Co. v. Smith*, 48 Ohio St. 219, 31 N. E. 743.

¹³¹ *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

¹³² In *Totten v. Tison*, 54 Ga. 139, preferred stock secured by first mortgage bonds was issued in order to procure money, under an agreement that the stock might be redeemed by the corporation, or converted into common stock, at the end of two years, at the option of the holders. At the end of the two years, the corporation being unable to redeem the shares, the certificates were surrendered by the holders, and exchanged for the mortgage bonds. The holders of the certificates never took any part or voted at stockholder's meetings, nor were they entered on the books of the corporation as stockholders. In a contest between creditors over the assets of the corporation, after insolvency, it was held that the holders of these bonds were entitled to claim as creditors. The court recognized the general rule that preferred stockholders are not in the position of creditors, but held that it did not apply to the peculiar facts of this case; that the transaction was, in effect, a loan. A

the claims of other creditors, out of the gross earnings,¹³³ and the holders of the stock would not be subject to the statutory liability for debts of the corporation. "The relation of the holder of preferred stock is, in some of its aspects, similar to that of a creditor; but he is not a creditor, save as to dividends, after the same are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor. He cannot, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent. If the latter, he takes no interest in the company's affairs, is not concerned in its property or profits as such, but his whole right is to receive agreed compensation for the use of the money he furnishes, and the return of the principal when due. Whether he is the one or the other depends upon a proper construction of the contract he holds with the company."¹³⁴

WATERED AND BONUS STOCK.

- 146. By the weight of authority, in the absence of constitutional or statutory prohibition, where a corporation issues stock gratuitously, or under an agreement by which the holder is to pay less than its par value, either in money or in property or services—**
- (a) The transaction is binding upon the corporation.**
 - (b) It is binding as against stockholders who participate or acquiesce therein.**
 - (c) But it is a fraud upon dissenting stockholders, and they may sue in equity to enjoin or cancel the issue.**
 - (d) If the stock is original stock, issued on subscription, the transaction is a fraud upon creditors of the corporation, who deal with it on the faith of the stock being full paid; and, if the corporation becomes insolvent, the original holders of such stock, and purchasers with notice, may be held liable for its par value to pay such creditors.**
 - (e) When a corporation is an active and going concern, it may issue stock at its market, instead of its par, value, in payment of a debt, or to raise money or purchase property necessary for carrying on its business, and, if the stock is issued as full paid, and the transaction is in good faith, the holders of the stock will not be liable to creditors.**

statute may give to preferred stock, issued to obtain money, a lien on the franchises and property of the corporation prior to any subsequent mortgage or incumbrance. *Heller v. National Marine Bank*, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212.

¹³³ See *Gordon's Ex'rs v. Railroad Co.*, 78 Va. 501.

¹³⁴ *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

(f) If stock is issued as a bonus, and without consideration, the holders will be liable for the par value of the stock to creditors who deal with the corporation on the faith of the stock being full paid. This rule is not recognized in New York. —

(g) In any case, only those creditors who have dealt with the corporation on the faith of the stock being full paid can complain. Therefore, the holders of stock issued as full paid, without being paid in fact, are not liable

(1) To persons who became creditors before the stock was issued.

(2) Or who became creditors with knowledge of the facts.

147. In the absence of constitutional or statutory prohibition, stock may be paid for in property or services, if they are such as the corporation has the power to purchase or engage; and by the weight of authority the transaction will be valid as against creditors, if it was free from fraud, though the property may in fact have been worth less than the stock. If the overvaluation is intentional, the transaction is fraudulent as a matter of law, and obvious and gross overvaluation, if unexplained, is conclusive evidence of intentional overvaluation.

148. These rules are to some extent inapplicable under peculiar constitutional or statutory provisions in force in some states.

Effect as to the Corporation.

In the absence of constitutional or statutory prohibition, or express prohibition in its charter, a corporation may bind itself by an issue of stock as full paid on receipt of partial payment only, either in money or in property or services. It cannot repudiate the agreement, and recover from the holder of the stock the difference between what he has paid and the par value. And it can make no difference whether the agreement is made with original subscribers or whether the stock is issued by the corporation in order to raise money, pay debts, or obtain property after it has become an active and going concern.¹⁸⁵

In *Scovill v. Thayer*¹⁸⁶ it was agreed between a corporation and all of its stockholders that only 20 per cent. should be paid on their shares. Mr. Justice Woods said: "As between them and the company,

¹⁸⁵ *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Harrison v. Railway Co.* (C. C.) 13 Fed. 522; *Kenton Furnace Railroad & Manuf'g Co. v. McAlpin* (C. C.) 5 Fed. 737; *Christensen v. Eno*, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; *Union Mut. Life Ins. Co. v. Frear Stone Manuf'g Co.*, 97 Ill. 537, 37 Am. Rep. 129; *First Nat. Bank v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510, 1 Cumming, Cas. Priv. Corp. 850. Compare, however, *Morrow v. Steel Co.*, 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658; *Ooregum Gold-Min. Co. v. Roper* [1892] App. Cas. 125, 2 Cumming, Cas. Priv. Corp. 247; *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725.

¹⁸⁶ 105 U. S. 143, 26 L. Ed. 968.

this was a perfectly valid agreement. It was not forbidden by the charter of the company, or by any law or public policy, and as between the company and its stockholders was just as binding as if it had been expressly authorized by the charter. If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied by 'discount,' according to their contract, the stockholders could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company."

In *Arapahoe Cattle & Land Co. v. Stevens*,¹³⁷ a corporation, in order to procure money for carrying on its business, entered into a contract with plaintiff, a person not connected with it, by which it agreed to pay him in stock $33\frac{1}{3}$ per cent. of any sum he should procure to be loaned to it. Plaintiff procured a bank to lend the corporation \$5,000, and the court held that the transaction was not ultra vires, but, in the absence of fraud, was binding upon the corporation, though the price agreed to be paid was extravagant.

A corporation free from indebtedness, if acting in good faith, has the power, as between itself and its stockholders (all the stockholders uniting therein), to agree, in consideration of the surrender by the stockholders to it of accumulated profits and of the increased value of its property, to treat stock upon which only 50 per cent. has been paid as full-paid stock; and the corporation cannot afterwards, in its own behalf, or on behalf of subsequent creditors with notice, disturb the arrangement.¹³⁸ So, if a corporation with the assent of all the stockholders, issues stock as a gratuity to stockholders who have been called upon to pay calls on their original subscriptions in excess of what was expected, the transaction is binding upon the corporation according to the intention, and it cannot hold the stockholders liable on the stock.¹³⁹

If the issue of stock without consideration, or without receiving its par value in money or property, is not only prohibited by the constitution or by statute, but the issue is declared void, stock so issued can have no effect at all. It is absolutely void, and the holders do not become stockholders.¹⁴⁰ The effect of particular constitutional and statutory provisions is considered in a subsequent paragraph.

¹³⁷ 13 Colo. 534, 22 Pac. 823.

¹³⁸ *Kenton Furnace, Railroad & Manuf'g Co. v. McAlpin* (C. C.) 5 Fed. 737.

¹³⁹ *Christensen v. Eno*, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429.

¹⁴⁰ *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954.

Effect as to Stockholders.

A stockholder may maintain a bill in equity to enjoin a threatened and unauthorized issue of stock gratuitously, or for less than its par value; and, where stock has already been so issued, a stockholder who has not participated or acquiesced in the transaction may maintain a bill to cancel the same.¹⁴¹ But a stockholder who has participated or acquiesced in the transaction cannot complain.¹⁴² And clearly a stockholder who has not only acquiesced in the transaction, but has also received part of the stock so issued, will not be heard to complain. A dissenting stockholder must raise objection without delay, or relief may be barred by laches. If he knows of the issue or contemplated issue, and neglects for an unreasonable time to take any steps to cancel or prevent it, he will be deemed to have acquiesced, and he cannot afterwards complain.¹⁴³

Effect as to Creditors.

The fact that a corporation or stockholders cannot complain of a transaction in which stock is issued as full paid on payment of a part only of its par value does not necessarily preclude creditors from objecting. In some cases they may recover from the holder of such stock the difference between its par value and the amount paid. In other cases they cannot do so. In dealing with this branch of the subject, we shall first consider original subscriptions. We shall then consider the issue of stock by a corporation when it is an active corporation, or, as it sometimes expressed, "a going concern." We shall then consider questions relating to the valuation of property or services received in payment for stock, and finally we shall ascertain the effect of peculiar constitutional or statutory provisions on the subject.

Same—Payment of Original Subscriptions.

All the courts will no doubt agree that an original subscriber to the capital stock of a corporation must pay its par value, in order to be protected against claims of creditors of the corporation on its becoming insolvent. Nothing less than this will make the stock full paid as against creditors. The earlier English cases held that, where a corporation issues stock under an agreement with the subscriber by which

¹⁴¹ *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788; *Perry v. Tuscaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364, 9 South. 217; *Flisk v. Railroad Co.*, 53 Barb. (N. Y.) 513.

¹⁴² 1 Cook, *Stock, Stockh. & Corp. Law*, § 39; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Callanan v. Windsor*, 78 Iowa, 193, 42 N. W. 652; *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 114 Mich. 494, 72 N. W. 362; *Washburn v. National Wall-Paper Co.*, 81 Fed. 17, 26 C. C. A. 312. Nor can his transferee complain. *Ambrose Lake Tin & C. Min. Co. v. Hayes*, L. R. 14 Ch. D. 390; *Parsons v. Hayes*, 14 Abb. N. C. (N. Y.) 419. See post, p. 386.

¹⁴³ *Taylor v. Railroad Co.* (C. C.) 13 Fed. 152.

only a part of the par value is to be paid in, the contract, if void at all, is void in toto, or, if valid at all, is valid in toto; and that in either view the assignee in insolvency of the corporation cannot compel the holders of such stock to pay the difference between what they have paid or agreed to pay and the par value of the stock.¹⁴⁴ Under a statute, however, and, it seems, independently of any statutory provision, the later English cases hold otherwise.¹⁴⁵ And in this country it has for a long time been well settled that one who subscribes for stock in a corporation under an agreement by which he is to pay less than the par value cannot stand on his agreement where the corporation becomes insolvent, and it becomes necessary to hold him for the full amount of his subscription in order to satisfy the claims of creditors of the corporation who have dealt with it on the faith of the stock having been fully paid up. The agreement may be binding upon the corporation and upon participating or assenting stockholders, but it is void as against such creditors. The rule does not depend upon any constitutional or statutory prohibition, and the question of actual fraud is altogether immaterial.¹⁴⁶

Some of the cases base this rule on the doctrine laid down by Mr. Justice Story in *Wood v. Dummer*,¹⁴⁷ that the capital stock of a corporation is a trust fund for the payment of its debts. "The reason," said Mr. Justice Woods in *Scovill v. Thayer*,¹⁴⁸ "is that the stock subscribed is considered in equity as a trust fund for the payment of credit-

¹⁴⁴ *Currie's Case*, 3 De Gex, J. & S. 367; *De Ruvigne's Case*, 5 Ch. Div. 306; *Anderson's Case*, 7 Ch. Div. 94.

¹⁴⁵ *In re Addlestone Linoleum Co.*, 58 Law T. (N. S.) 428; *In re London Celluloid Co.*, 59 Law T. (N. S.) 109. And see *Ooregum Gold Min. Co. of India v. Roper* [1892] App. Cas. 125, 2 Cumming, Cas. Priv. Corp. 247. See *Cook, Corp.* § 42; 10 Cyc. 470.

¹⁴⁶ *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, 1 Cumming, Cas. Priv. Corp. 824; *Ogilvie v. Insurance Co.*, 22 How. (U. S.) 380, 16 L. Ed. 349, 1 Cumming, Cas. Priv. Corp. 814; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731, 1 Cumming, Cas. Priv. Corp. 818; *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *In re Glen Iron Works (D. C.)* 17 Fed. 324; *Marsh v. Burroughs*, 1 Woods, 463, Fed. Cas. No. 9,112; *Union Mut. Life Ins. Co. v. Frear Stove Manuf'g Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Hickling v. Wilson*, 104 Ill. 54; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510, 1 Cumming, Cas. Priv. Corp. 850; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Northrop v. Bushnell*, 38 Conn. 498; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143. See, also, *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 47 N. W. 726, 23 Am. St. Rep. 417.

¹⁴⁷ 3 Mason, 308, Fed. Cas. No. 17,944, 1 Cumming, Cas. Priv. Corp. 805.

¹⁴⁸ 105 U. S. 143, 26 L. Ed. 968.

ors. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and, if it is not, a court of equity will, at his instance, require it to be paid." And it was said by Mr. Justice Brown in a later case: "It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such, nor by any device short of actual payment in good faith; and, while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of creditors."¹⁴⁹ The supreme court of Minnesota in a late case holds, in an opinion by Judge Mitchell, that the rule is not based on any trust-fund doctrine at all, but upon the ground of fraud,— the fraud consisting in impliedly representing to the public that the stock has been paid in full, when it has been paid in part only, or when nothing at all has been paid. "By putting it upon the ground of fraud," it was said "and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases."¹⁵⁰

Same—Increase of Capital Stock.

Where the capital stock of a corporation is increased, if the increase is for the purpose of adding to the original capital stock, and enabling the corporation to do a larger and more profitable business, subscribers to or purchasers of such stock stand practically upon the same

¹⁴⁹ *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363.

¹⁵⁰ *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, 1 Cumming, Cas. Priv. Corp. 885. See post, p. 528, where the trust-fund doctrine is discussed.

basis as subscribers to the original stock; and they are liable for the par value of the stock.¹⁵¹ In *Flinn v. Bagley*¹⁵² the defendants had subscribed and agreed to pay certain sums of money towards the increased capital stock of a corporation, with the understanding that they were to receive stock therefor at 66⅔ cents on the dollar, which was all the existing stock was worth, and all that the new stock could be sold for. The arrangement having been carried out, and certificates of stock issued, it was held that, though the case was a hard one upon the defendants, and no fraud was intended, the assignee in bankruptcy of the corporation could hold them for the remaining one-third of the par value of the stock. If a corporation increases its capital stock, and distributes part of the new stock among the stockholders as full paid, without any consideration, they will be liable to creditors of the corporation for its par value.¹⁵³

Same—Issue of Stock at Market Value by Active Corporation to Pay Debts, etc.

As has just been shown, in the case of original subscriptions to the capital stock of a corporation, and subscriptions to an increase of stock, the par value must be paid to protect the subscriber against the claims of creditors. A distinction has been made between these cases and cases in which an active corporation issues stock for the purpose of paying its debts, or for the purpose of procuring money for the prosecution of its business where its original capital has become impaired by loss or misfortune; and it has been held that in the latter cases, in the absence of constitutional or statutory prohibition, it may issue stock as full paid on payment of its actual value, instead of its par value; and, if the transaction is honest and fair, the holders of the stock will not be liable to creditors on the theory that the stock is not paid up. There are some decisions against this view,¹⁵⁴ but it is supported by reason and by the weight of authority.¹⁵⁵

¹⁵¹ *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855; *Flinn v. Bagley* (D. C.) 7 Fed. 785, 1 Cumming, Cas. Priv. Corp. 845; *Rickerson Roller-Mill Co. v. Farrell Foundry & Mach. Co.*, 75 Fed. 554, 23 C. C. A. 302.

¹⁵² (D. C.) 7 Fed. 785, 1 Cumming, Cas. Priv. Corp. 845.

¹⁵³ *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855.

¹⁵⁴ *Jackson v. Traer*, 64 Iowa, 469, 20 N. W. 764, 52 Am. Rep. 449, Rothrock, C. J., and SeEVERS, J., dissenting (disapproved in *Clark v. Bever*, infra).

¹⁵⁵ *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662.

In *Clark v. Bever*,¹⁵⁶ decided in 1891, a railroad company, of which the defendant's intestate was president and a stockholder, had a settlement with a construction company, of which he was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it 3,500 shares of its stock at 20 cents on the dollar, and they were accepted in full satisfaction of the debt. The stock was not worth anything on the market, and was issued directly to the defendant's intestate, and no other payment than the 20 per cent. was ever made on the stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim upon the theory that he was liable for the par value of the stock, whatever may have been its market value at the time it was issued. It was held that he could not recover.

So also, by the weight of authority, in the absence of constitutional or statutory prohibition, where an active corporation finds its original capital impaired by loss or misfortune, it may, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, when authorized to increase its capital stock, and may put it upon the market and sell it for the best price that can be obtained; and if the sale is fairly made, the purchasers cannot be held liable to creditors of the corporation, on its becoming insolvent, for the difference between the amount paid by them and the par value of the stock.¹⁵⁷ In *Handley v. Stutz*,¹⁵⁸ an active corporation, for the purpose of paying its debts, and obtaining money to prosecute its business, issued bonds; but, finding it impossible to negotiate them, it issued shares of capital stock in an amount equaling the par value of the bonds as an additional inducement to their purchase. The bonds and stock were sold at a price fairly representing their market value, without any unfair dealing on the part of any one connected with the transaction. Under these circumstances it was held that the purchasers could not be called upon to respond for the par value of the stock at the suit of the creditors of the corporation. "To say," said the court, "that a corporation may not, under the circumstances above indicated, put its stock upon the market, and sell it to the highest bidder, is practically to declare

¹⁵⁶ 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88. See, also, *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; *Union Loan & Trust Co. v. Southern California Motor-Road Co.* (C. C.) 51 Fed. 840.

¹⁵⁷ As we have seen, this does not apply where the stock is increased for the purpose of providing a larger capital and doing an extended business, and not to restore capital impaired by losses. Ante, p. 360.

¹⁵⁸ 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855.

that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and, so long as the transaction is bona fide, and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course, no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value."¹⁵⁹

If an active corporation can issue stock at its market value in payment of its debts, or to raise money necessary to carry on its business, as held in the cases referred to above, there seems to be no good reason why they cannot issue stock at its market value in payment for property or services which are necessary for the prosecution of its business, and which it can procure in no other way, and which it has the power to purchase or engage. And there are cases which hold that it can do so if the transaction is honest and fair. In *Van Cott v. Van Brunt*¹⁶⁰ a railroad company in good faith made a contract for the construction of its road, and agreed to pay therefor in its stock on the basis of its actual, instead of its par, value. The court of appeals of New York held that the contract was valid, and that the holders of the stock could not be held liable to creditors for the difference between what was thus paid and its par value. This decision has been criticized by text writers and by some of the courts,

¹⁵⁹ See, also, *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Dummer v. Smedley*, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490. But see *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 46 N. E. 894.

¹⁶⁰ 82 N. Y. 535. See dictum in *Barr v. Railroad Co.*, 125 N. Y. 263, 26 N. E. 145. And see *Coe v. Railroad Co. (C. C.)* 52 Fed. 531.

but it has often been approved, and has lately been reaffirmed by the New York court.

Same—Gratuitous Issue of Stock.

In New York it is held that the liability of a shareholder in a corporation to pay for stock does not arise out of the relation, but depends upon his contract with the corporation, express or implied, or upon some statute fixing his liability, and that, in the absence of either contract or statute, one to whom shares have been issued as a gratuity does not, by accepting them, commit any wrong upon creditors, or make himself liable to pay the par value of the shares for the payment of corporate debts.¹⁶¹ According to the better opinion, however, the rule is otherwise; and if a person accepts stock in a corporation, which is issued to him as a gratuity, and the corporation becomes insolvent, the law will create a promise to pay therefore in favor of creditors.¹⁶²

Same—Payment for Stock in Property or Services.

It is clear on principle, and well established by authority, that the directors of a corporation, in the absence of constitutional or statutory prohibition, may receive property or services in payment for stock, either from original subscribers or from persons to whom they sell stock, in any case in which they would have the power to purchase the property or contract for the services.¹⁶³ Such power is often expressly conferred by statute, but this is not necessary, for it exists at common law. Where the directors have the power to contract a debt for property or services, it would be absurd to say that they cannot pay for the same in stock, or receive the same in payment

¹⁶¹ Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429.

¹⁶² Stutz v. Handley (C. C.) 41 Fed. 531; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855. And see Skrainka v. Allen, 7 Mo. App. 434; Id., 76 Mo. 384; Washburn v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Morrow v. Steel Co., 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658.

¹⁶³ Carr v. Le Fevre, 27 Pa. 413; Brañt v. Ehlen, 59 Md. 1; Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Spargo's Case, 8 Ch. App. 407, 412. Stock issued for the good will of a business is issued for property actually received, within the meaning of the New York corporation law. Washburn v. National Wall Paper Co., 81 Fed. 17, 26 C. C. A. 312. Cf. See v. Heppenheimer (N. J. Ch.) 61 Atl. 843. Under a statute providing that the directors of a corporation may purchase "property necessary for their business" and issue stock "to the amount of the value thereof in payment therefor," the directors of a corporation organized for the consolidation of various industrial plants were not entitled, as against creditors, to issue stock in payment of property transferred to the corporation at a valuation based on a capitalization of contemplated profits. See v. Heppenheimer, supra.

of subscriptions, and to require them to first contract the debt, and then pay it with money received for stock or on subscriptions. Whether the stock must be paid for at its par value instead of its market value has been considered in the preceding paragraphs, and it has been seen that subscribers must pay the par value, but that, by the weight of authority, an active corporation may sometimes issue stock in payment of debts, or to raise money for the prosecution of its business, at its market value.

Same—Value of the Property or Services.

It is expressly provided by statute in some jurisdictions that property or services received in payment for stock must be taken at their money value. This is nothing more than a declaration of the common law in so far as dissenting stockholders and subsequent creditors of the corporation are concerned. Even in the absence of such a statute, for a corporation to issue stock for property intentionally overvalued would be a fraud upon dissenting stockholders; and, even if all the stockholders should consent, it would be a fraud upon persons dealing with the corporation. Dissenting stockholders could sue to enjoin the issue of stock for property intentionally overvalued, or to cancel it if issued; and persons afterwards dealing with the corporation could hold the persons to whom the stock is thus issued liable for the difference between the amount of their stock and the real value of the property.*

Where a corporation receives property or services in payment for stock, and issues the stock as full paid, it is very generally held that fraud or intentional overvaluation of the property or services must be shown before the holders of the stock can be held liable to creditors of the corporation on the ground that the stock is not full paid. It is not enough to show an overvaluation due to mere error of judg-

* *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133; *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17; *Elyton Land Co. v. Birmingham Warehouse & E. Co.*, 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65; *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652; *Wallace v. Carpenter Electric H. Mfg. Co.*, 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530; *Wishard v. Hansen*, 99 Iowa, 307, 68 N. W. 691, 61 Am. St. Rep. 238; *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807. Some cases hold, however, that the transaction is valid and binding on all parties, unless there is a fraudulent overvaluation, and that in such case, as in other cases of fraud, the only remedy is a rescission, which must be in toto; the corporation returning the property and receiving back the stock. See *Van Cott v. Van Brunt*, 82 N. Y. 535; *Du Pont v. Tilden (C. C.)* 42 Fed. 87; *Cook, Corp.* §§ 42, 46.

ment.¹⁶⁴ "The transaction may be impeached for fraud, but not for error of judgment, or mistaken views of the value of the property, inasmuch as good faith and the exercise of an honest judgment is all that is required."¹⁶⁵ In *Gamble v. Queens County Water Co.*¹⁶⁶ a shareholder in a water company, at his own expense, and for his own benefit, built a system of pipes, etc., suitable for an extension of the company's plant, and the corporation purchased the same from him, issuing in payment stocks and bonds of the value of \$110,000. The cost of the work was from \$80,000 to \$85,000. It was held that the difference was not so large as to necessarily indicate fraud, and the transaction was upheld.

Some of the cases hold that an actual fraudulent intent must be shown in order that a person who pays for his stock in property may be held liable to creditors on the ground that the property was overvalued, and some opinions contain dicta to this effect.¹⁶⁷ But by the better opinion this is not necessary. The directors of a corporation have no right to take in payment for stock property that is intentionally overvalued. Laying aside all question as to whether there is an actual intention to defraud, such a transaction would be a fraud in law, both upon dissenting stockholders and upon persons dealing

¹⁶⁴ *Colt v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, 1 Cumming, Cas. Priv. Corp. 847 (as construed in *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855); *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; *Schenck v. Andrews*, 57 N. Y. 133; *Douglass v. Ireland*, 73 N. Y. 100; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Gamble v. Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Richardson v. Treasure Hill Min. Co.*, 23 Utah, 366, 65 Pac. 74; *Taylor v. Cummings*, 127 Fed. 108, 62 C. C. A. 108. Many courts, however, assert a stricter rule, and declare that good faith is not enough, but that the property must be the fair equivalent in value of the stock issued for it. See *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644; *State Trust Co. v. Turner*, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; *Kelly v. Fourth of July Min. Co.*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705; *Gillin v. Sawyer*, 93 Me. 151, 44 Atl. 677.

¹⁶⁵ *Douglass v. Ireland*, 73 N. Y. 100.

¹⁶⁶ 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

¹⁶⁷ See *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068; *Colt v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, 1 Cumming, Cas. Priv. Corp. 847; *Young v. Iron Co.*, 65 Mich. 111, 31 N. W. 814; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *Clow v. Brown* (Ind. Sup.) 31 N. E. 361; *Carr v. Le Fevre*, 27 Pa. 413; *Brant v. Ehlen*, 59 Md. 1; *Bickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250; *Clayton v. Knob Co.*, 109 N. C. 385, 14 S. E. 37; *Walburn v. Chenault*, 43 Kan. 352, 23 Pac. 657; *Grant v. Railroad Co.*, 4 C. C. A. 511, 54 Fed. 569; *Donald v. American Smelting & R. Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116.

with the corporation on the faith of its stock being fully paid up, and it would be just as invalid as against creditors as a payment for stock in money at a discount. If the nature of the property and the extent of the overvaluation are such that the overvaluation may possibly have been due to error of judgment, then, to render the transaction invalid as against creditors, actual fraud must be shown, and the question is one of fact.¹⁶⁸ If, on the other hand, the overvaluation is so gross and obvious that it could not have been due to mere error of judgment, the transaction will be held fraudulent as a matter of law.¹⁶⁹ This seems to be the fair result of the cases, if the opinions are read in the light of the facts actually before the court.

In *Wetherbee v. Baker*¹⁷⁰ five persons agreed for the purchase of a tract of land, and organized themselves into a corporation under a land improvement act. In the certificate of incorporation the capital stock was fixed at \$100,000, and these persons subscribed for all of it, and became the directors of the company. The consideration of the purchase was \$50,000. The deed was made directly to the corporation, and it gave its obligations for the whole purchase money. The directors then appraised the lands at \$100,000, and credited \$50,000 of the valuation as a credit of 50 per cent. on the subscriptions. The land was not worth more than the original purchase money, and the corporation acquired no other property. It was held that, as against creditors of the corporation, the allowance of a credit of 50 per cent. on the subscriptions was invalid, and that the stockholders were liable for the whole amount of their subscriptions as they appeared in the certificate of incorporation.

In *Douglass v. Ireland*¹⁷¹ the entire capital stock of a corporation,

¹⁶⁸ See *Douglass v. Ireland*, 73 N. Y. 100; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Graves v. Brooks*, 117 Mich. 424, 75 N. W. 932.

¹⁶⁹ See *Boynton v. Andrews*, 63 N. Y. 93; *Boynton v. Hatch*, 47 N. Y. 225; *National Tube-Works Co. v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Northwestern Mut. Life Ins. Co. v. Cotton-Exchange Real-Estate Co. (C. C.)* 46 Fed. 22; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65, 1 Cumming, Cas. Priv. Corp. 870; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, 43 N. W. 291, 5 L. R. A. 649; *First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510, 1 Cumming, Cas. Priv. Corp. 850; *Garrett v. Mining Co.*, 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713. Compare *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904; *Wallace v. Carpenter Electric H. Mfg. Co.*, 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530; *National Bank of Merrill v. Illinois & W. Lumber Co.*, 101 Wis. 247, 77 N. W. 185; *Lea v. Iron Belt M. Co.*, 119 Ala. 271, 24 South. 28; See *v. Heppenheimer* (N. J. Ch.) 61 Atl. 843.

¹⁷⁰ 35 N. J. Eq. 501. See, also, *Clevenger v. Moore*, 71 N. J. Law, 148, 58 Atl. 88.

¹⁷¹ 73 N. Y. 100.

\$300,000, was issued to one of its trustees in consideration of the assignment to the company of two contracts for the purchase of mining property, upon which nothing had been paid, the contract price being \$40,000. One-third of the stock was immediately transferred to the company, to be sold to raise a working capital, and was sold at from 40 to 60 cents on the dollar. Defendant, knowing the circumstances, and having participated as trustee of the corporation in the transaction, purchased \$25,000 of the stock at 40 cents. The jury found the value of the property to be \$68,000. It was held that the evidence justified a finding of fraud, and that the defendant was liable to creditors of the corporation.

When property taken by a corporation in payment for stock is not only grossly overvalued, but there are other circumstances from which actual fraudulent intent may be inferred, there can be no question but that the stockholder is liable to subsequent creditors of the corporation, who became such in ignorance of the circumstances under which the stock was issued, for the difference between the value of the property and the par value of the stock.¹⁷²

In determining the value of property thus received in payment for stock, the true valuation is the value to the company; and where the property has been produced by the labor and at the expense of the person from whom it is received, a fair profit to him is to be included.¹⁷³ If the property is taken by the corporation at an honest valuation, fairly made and agreed upon, the transaction will not be rendered invalid by the fact that its value, estimated in the light of subsequent events, does not equal the amount at which it was received.¹⁷⁴ It will be presumed, in the absence of any proof as to the value of property received in payment for stock, that it was adequate.¹⁷⁵

¹⁷² Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111, affirming (C. C.) 86 Fed. 54, 1 L. R. A. 140.

¹⁷³ Gamble v. Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527. In this case a shareholder in a water company, having built a system of pipes, etc., suitable for an extension of the company's plant, and having sold the same to the corporation for stock and bonds, it was held that, in determining the value of the property, the question was the value to the company, and that there should be included in the estimate, in addition to the money actually expended for labor and materials, an adequate charge by the owner and his assistant for personal services in superintending the work, interest upon the money invested, amounts saved by fortunate purchases of material, and a reasonable profit upon the undertaking, having regard to the nature and risks of the work. As to the elements to be considered in estimating value, see Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363.

¹⁷⁴ Colt v. Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, 1 Cumming, Cas. Priv. Corp. 847; Carr v. Le Fevre, 27 Pa. 413; Richardson v. Treasure Hill Min. Co., 23 Utah, 366, 65 Pac. 74.

¹⁷⁵ Davis v. Chemical Co., 101 Ala. 127, 8 South. 496.

Same—Creditors Who Cannot Complain.

The true reason why creditors of an insolvent corporation can hold the persons to whom the corporation has issued stock as full paid, when nothing at all, or only a part of it, has been paid, being that holding such stock out to the public as full paid is a fraud upon persons dealing with the corporation on the faith of the stock being actually fully paid for, only those creditors who come within the reason of the rule can complain.¹⁷⁶ It follows that creditors cannot attack a transaction by which a corporation has issued stock gratuitously or for a cash discount, or for property worth less than the amount of the stock, if they knew the facts, and did not give credit to the corporation in the belief that the stock was fully paid. In *Coit v. North Carolina Gold Amalgamating Co.*¹⁷⁷ it was held that where, upon the purchase of additional property by a corporation, its capital stock was increased by the issue to the stockholders, upon the surrender of their old certificates, of new stock to a much greater extent than the value of the additional property, the stockholders could not be held liable on the stock at the suit of a creditor who was cognizant of the whole transaction, and acquiesced in it.¹⁷⁸ So, when the stock of a corporation is increased, and the increased stock issued for less than its value, persons who became creditors of the corporation prior to the increase cannot hold the purchasers or holders of such stock liable for its value; for they could not, by any legal presumption, have trusted the corporation upon the faith of such stock.¹⁷⁹ But

¹⁷⁶ Ante, p. 360.

¹⁷⁷ 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, 1 Cumming, Cas. Priv. Corp. 847.

¹⁷⁸ And see *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630; *First Nat. Bank v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510, 1 Cumming, Cas. Priv. Corp. 850; *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, 1 Cumming, Cas. Priv. Corp. 885; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554, 23 C. C. A. 302; *State Trust Co. v. Turner*, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 87 S. W. 933, 107 Am. St. Rep. 335. Where the articles of a corporation were recorded as required by law, and provided that only 15 per cent. of the par value of the stock subscribed should be collected, and that such limitation should not be changed except by unanimous consent of the stockholders, and showed the amount subscribed by each stockholder and the cash paid therefor, the unpaid portion of such stock was not an asset for the benefit of the creditors, since the recorded articles gave notice of the liability of the stockholders. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307.

¹⁷⁹ *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855, affirming (C. C.) 41 Fed. 531. And see *Graham v. Railroad Co.*, 102 U. S. 148, 26 L. Ed. 106, 1 Cumming, Cas. Priv. Corp. 1006; *Wallace v. Carpenter Electric H. Mfg. Co.*, 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530.

persons who become creditors after the increase is voted are entitled to look to those who subsequently receive the stock, though their debts are contracted before the stock is received.¹⁸⁰

"The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But, when the reason for the rule does not exist, the rule itself ceases to apply. This trust does not arise absolutely in every case in favor of any and every creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment."¹⁸¹

In some states, however, by statute, the right of the creditor to enforce liability against the stockholder who has not paid in full is not dependent upon the knowledge possessed by the creditor that the subscription for the stock was not paid in full.*

Effect of Constitutional and Statutory Provisions.

In a number of states constitutional or statutory provisions have been adopted or enacted with a view to preventing the issue of watered stock. These provisions vary somewhat in the different states. Even where they are similar, the courts have not always agreed in construing them.

In quite a number of states it is provided, in substance, that no corporation shall issue stock except for labor done, services performed, or money or property actually received; and all fictitious increase of stock shall be void. If effect is given to the language of this statute, it seems clear that stock issued by a corporation without any considera-

¹⁸⁰ *Handley v. Stutz*, supra.

¹⁸¹ *First Nat. Bank v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510, 1 Cumming, Cas. Priv. Corp. 850.

* *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17.

tion at all is absolutely void, and the holders do not become stockholders at all for any purpose. It was so held by the supreme court of Colorado, where a holder of such stock sought to maintain an action, the right to maintain which depended upon his being a stockholder.¹⁸² It would seem to follow necessarily from this construction that the corporation could refuse to recognize him as a stockholder, and that he could not be held liable to creditors.¹⁸³ A contract which contemplates the violation of this provision is illegal and void.¹⁸⁴ While a contract by a corporation to issue stock in violation of the statute for labor and property is executory, the corporation may maintain a suit to rescind the contract.¹⁸⁵ In such a case it has been held the contractor may recover from the corporation the value of the labor and materials actually furnished by him, if his conduct has been free from actual bad faith.¹⁸⁶ By the better opinion, a person who has entered into a contract to take stock to be issued in violation of the statute may withdraw before it is issued, and recover money paid by him under the contract, for, if an illegal agreement is not *malum in se*, but merely *malum prohibitum*, a *locus poenitentiae* remains; and, while the illegal object has not been carried out by performance of the agreement, it may be repudiated, and money paid under it may be recovered.¹⁸⁷ But, if the stock has been issued, and the illegal object thereby carried out, such an action cannot be maintained.¹⁸⁸

The constitution of Arkansas provides that "no private corporation shall issue stocks or bonds except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void." In *Memphis & L. R. R. Co. v. Dow*¹⁸⁹ the supreme court of the United States, construing this provision, held that it was not intended to make the validity of every issue of stock or

¹⁸² *Arkansas River L. T. & C. Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954. See, also, *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253; *First Ave. Land Co. v. Parker*, 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841.

¹⁸³ But see *Nenny v. Waddill*, 6 Tex. Civ. App. 244, 25 S. W. 308.

¹⁸⁴ *Williams v. Evans*, 87 Ala. 725, 6 South. 702, 6 L. R. A. 218; *Garrett v. Mining Co.*, 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713.

¹⁸⁵ *New Castle Northern Ry. Co. v. Simpson (C. C.)* 21 Fed. 533.

¹⁸⁶ *New Castle Northern Ry. Co. v. Simpson*, *supra*. See, also, *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

¹⁸⁷ *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347, affirming 14 Blatchf. 364, Fed. Cas. No. 7,908; *Clark, Cont. (2d Ed.)* 338. *Contra*, *Knowlton v. Spring Co.*, 57 N. Y. 518.

¹⁸⁸ *Clarke v. Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

¹⁸⁹ 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595. Compare *New Castle Northern Ry. Co. v. Simpson (O. C.)* 21 Fed. 533.

bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued; or to restrict corporations, acting with the approval of their stockholders, in the exchange of their stock or bonds for money, property, or labor, upon such terms as they may deem proper, provided the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law. And the court held that the provision did not prevent mortgage bondholders, who bought in the property and franchises of a corporation upon foreclosure, from fixing the terms upon which they would surrender those interests, and that they might reorganize upon substantially the same basis, as to capital stock and bonded indebtedness, as that of the old corporation, although under that arrangement they received both stock and bonds to a large amount, of which the amount of the stock alone was sufficient to cover the full value of the property, rights, and privileges of the reorganized company.

In California, under such a provision, it was held that an increase of stock in a water company, and an issue of the same at the actual market value, which was less than the par value, for the purpose of enlarging the works, was not a fictitious issue, and was authorized.¹⁹⁰

In *Peoria & S. R. Co. v. Thompson*¹⁹¹ it was held that a similar provision in Illinois applying to railroad companies was intended to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not, and are not intended to, represent money or property of any kind, either in possession or in expectancy, the stock or bonds in such case being entirely fictitious; that it was not intended to interfere with the usual and customary methods of raising funds by railroad companies by the issue of its stock or bonds, for the purpose of building their roads, or of accomplishing other legitimate corporate purposes.

Such a provision prohibits the issue of stock to subscribers on payment in cash of a less sum than its par value.¹⁹² And it has been held that it prohibits a corporation from doubling its capital stock, and distributing the new stock among the stockholders as a stock divi-

¹⁹⁰ *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662. And see *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015; *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 432, 17 L. R. A. 375.

¹⁹¹ 103 Ill. 187. See, also, *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17.

¹⁹² *Williams v. Evans*, 87 Ala. 725, 6 South. 702, 6 L. R. A. 218.

dend on the ground that its original capital stock has been invested in property which has more than doubled in value.¹⁹³

As we have seen, the New York court has held, in the absence of constitutional or statutory prohibition, that a corporation, in issuing stock in payment of property, may issue it at its actual, instead of its par, value.¹⁹⁴ The New York statute relating to manufacturing corporations provides that on the purchase of property by such a corporation, stock may be issued "to the amount of the value of the property" in payment, and that the stock so issued shall be taken to be full-paid stock. It has been held that the statute means that the stock must be issued at its par value, though that may be greater than its market value.¹⁹⁵

In Alabama there are constitutional and statutory provisions prohibiting the issue of stock except for money or property actually received, and requiring all stock subscriptions to be paid in money, or in labor or property at its money value. Under these provisions it was said in *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*¹⁹⁶ that subscribers who pay their subscriptions in labor or property of a less money value than the amount of their subscriptions, though this is done by all the subscribers, and though there is no fraud, are liable to creditors of the corporation for the difference between the value of the property and the amount of their subscriptions. The dictum in this case goes much further than was necessary. The defendants had organized a corporation with a capital stock of \$250,000, and subscribed for the whole amount. In payment of their subscription they transferred to the company a bond for title for land for which they had paid only \$5,000. For the balance of the purchase money (about \$50,000) the company executed its notes. The land was worth no more than was paid for it. Here, therefore, was a case in which there was so great a difference between the amount of stock and the value of the property that the court could have held it to be a case of fraud in law, and the decision, on the facts, is nothing more than an application of the doctrine explained in a preceding paragraph. The New York cases under a similar provision are to the same effect.¹⁹⁷ It is not to be supposed that the Alabama court would hold a transaction by which a corporation receives property in payment for stock invalid as against credit-

¹⁹³ *Fitzpatrick v. Publishing Co.*, 83 Ala. 604, 2 South. 727.

¹⁹⁴ *Van Cott v. Van Brunt*, 82 N. Y. 535.

¹⁹⁵ *Gamble v. Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

¹⁹⁶ 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65, 1 Cumming, Cas. Priv. Corp. 870. See, also, *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593.

¹⁹⁷ Ante, p. 367.

ors, where there was no actual fraud, and the overvaluation was not intentional, but was due merely to error of judgment.

Liability of Transferees.

Where stock is issued by a corporation as full paid on payment of a part only, and the person to whom it is issued transfers the same to a purchaser with notice, the transferee stands in the transferror's shoes, and will be liable on the stock to the same extent as the transferror. But, if the transfer is to a purchaser without notice, no such liability attaches. The stock, in his hands, must be regarded as full paid.¹⁹⁸ It was said by the court of appeals of Maryland in *Brant v. Ehlen*:¹⁹⁹ "The liability for subscription to the stock of a corporation is founded on contract. Where one agrees to take a certain number of shares, the law implies a promise to pay for them according to the terms of his subscription. If they are sold before all installments are paid, and are bought with such knowledge, the law implies a promise on the part of the purchaser to pay whatever may be due thereon, according to the terms of the original subscription. In such cases the purchaser stands in the shoes of the original subscriber. These are elementary principles, about which there can be no contention. But where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied, on the part of the purchaser without notice, to be answerable, either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and, if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud." Nor can he be held liable in such a case under the doctrine that the unpaid subscriptions of an insolvent corporation constitute a trust fund for the payment of its debts, for the doctrine does not apply in such a case.²⁰⁰

¹⁹⁸ *Brant v. Ehlen*, 59 Md. 1; *Du Pont v. Tilden* (C. C.) 42 Fed. 87; *Steacy v. Railroad Co.*, 5 Dill. 348, Fed. Cas. No. 13,329; *Cleveland Rolling-Mill Co. v. Texas & St. L. Ry. Co.* (C. C.) 27 Fed. 250; *Young v. Iron Co.*, 65 Mich. 111, 31 N. W. 814; *Wallace v. Carpenter Electric H. Mfg. Co.*, 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530; *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17; *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644; *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494. And see *Libby v. Tobey*, 82 Me. 397, 19 Atl. 90a.

¹⁹⁹ 59 Md. 1.

²⁰⁰ *Brant v. Ehlen*, *supra*.

**ACTIONS BY STOCKHOLDERS FOR INJURIES TO CORPORATION
—INTERFERENCE IN MANAGEMENT.**

149. AT LAW—A stockholder cannot maintain an action at law for an injury to the corporation. Such an action can only be brought by the corporation.

150. IN EQUITY—The corporation is the proper party to sue in equity to redress or prevent wrongs against it, committed or threatened, either by strangers, or by its own officers or agents; but a court of equity will entertain such a suit by a stockholder, on behalf of himself and the other stockholders, where, for any reason, redress or protection cannot be obtained through the corporation or its officers.

151. To enable a stockholder to maintain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the proper party to sue, there must exist as the foundation of the suit:

- (a) Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred upon them by the charter or other source of organization.
- (b) Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other stockholders.
- (c) Or the board of directors or trustees, or a majority of them, must be acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders.
- (d) Or the majority of the stockholders themselves must be oppressively and illegally pursuing a course which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.
- (e) In addition to the existence of grievances calling for equitable relief, it must appear that the complainant has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances. He must apply to the managing officers to take action in the corporate name; and if he fails with them, he must, if the matter will admit of the delay, seek to obtain action by the stockholders as a body, unless for some reason such attempt would be useless.

As was explained in treating of the nature of a corporation, the corporate body exists in law as a legal entity, separate and distinct from the members who compose it. The corporation and its members are not the same thing for the purpose of suits to redress injuries to the corporation. A corporation is a collection of individuals, it is true; but the individuals in their collective capacity are represented

by the corporation, the artificial person. An infringement of their collective rights is an injury to the corporation, for which an action, if brought at all, must be brought by the corporation. For such injuries, as a general rule, the individual members cannot sue. This applies not only to injuries inflicted by strangers, but it also applies to injuries resulting from the wrongs of the officers or agents of the corporation.

Actions at Law.

It is well settled that a stockholder cannot maintain an action at law for injury to the corporation, either by its officers or by a stranger. The property of a corporation belongs to the corporation as a distinct legal entity separate from the members who compose it, and for any injury thereto the corporation must sue. Neither a single stockholder, for instance, nor even all of the stockholders, could maintain trover or trespass for conversion of or injury to the corporate property, or replevin to recover the same; but all such suits must be brought by the corporation.²⁰¹ Nor can a stockholder maintain an action at law against the directors or other officers of a corporation for their negligence or misfeasance in conducting its affairs, whereby the capital is wasted and lost, though the shares are thereby rendered worthless. Such an action, when it can be maintained at all, must be brought by the corporation, for the injury is to the corporation.²⁰² All injuries to corporate property are indirectly injurious to the stockholders, but at law their rights must invariably be asserted through the corporation. If, for any reason, the corporation will not sue for injuries suffered by it, the remedy of a stockholder, if he has any, is in equity.

The rule which restrains the stockholder from suing to redress wrongs against the corporation does not operate to restrain him from suing to redress wrongs which are not only wrongs against the corporation, but also violations of duties arising from contracts or other-

²⁰¹ Ante, pp. 5, 6; *Tomlinson v. Bricklayers' Union No. 1*, 87 Ind. 308, 1 Cumming, Cas. Priv. Corp. 33; *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131, 1 Cumming, Cas. Priv. Corp. 38. The mere fact that one has become sole owner of the stock does not entitle him to sue in his own name on an account stated. *Randall v. Dudley*, 111 Mich. 437, 69 N. W. 729.

²⁰² *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 792; *Talbot v. Scripps*, 31 Mich. 268; *Allen v. Ourtis*, 26 Conn. 456; *Collier v. Deering Camp Ground Ass'n*, 66 S. W. 183, 23 Ky. Law Rep. 1799; *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562. An action at law cannot be maintained by a stockholder for conspiracy to injure and ruin the corporation. *Converse v. United Shoe M. Co.*, 185 Mass. 422, 70 N. E. 444; *Niles v. New York Cent. & H. R. R. Co.*, 176 N. Y. 119, 68 N. E. 142.

wise and owing directly to the stockholders. Thus, if a stockholder pledge his stock as collateral with directors of the corporation, and they enter into a conspiracy to depreciate the price of the stock by using their power as directors, for the purpose of buying it in for less than its value, this is a wrong, not only against the corporation, but against the pledgor, for which there is a direct liability to him.*

Suits in Equity.

It was at one time contended that a court of equity had no jurisdiction over a corporation, as such, at the suit of a stockholder for violations of its charter. But that it has such jurisdiction is now well settled. It was said by the supreme court of the United States in 1855: "It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."²⁰⁸

If a case arises of injury to a corporation by some of its members, or by its officers, or by strangers, for which no adequate remedy remains except that of a suit by individual members in their private characters, asking in such character the protection of those rights to which in their corporate character they are entitled, a court of equity will regard the claims of justice as superior to any difficulties

* *Ritchie v. McMullen*, 79 Fed. 522, 25 C. C. A. 50; *Krohn v. Williamson* (C. C.) 62 Fed. 869. Cf. *De Neufville v. New York & N. Ry. Co.*, 81 Fed. 10, 26 C. C. A. 306; *Fletcher v. Newmark Telephone Co.*, 55 N. J. Eq. 47, 35 Atl. 903.

²⁰⁸ *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401, 1 Cumming, Cas. Priv. Corp. 739. And see *Pratt v. Pratt, Read & Co.*, 33 Conn. 446, 455, 2 Cumming, Cas. Priv. Corp. 210; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; *Stevens v. Railroad Co.*, 29 Vt. 545; *Hardon v. Newton*, 14 Blatchf. 376, Fed. Cas. No. 6,054, 1 Cumming, Cas. Priv. Corp. 487; *Bacon v. Robertson*, 18 How. (U. S.) 480, 15 L. Ed. 499, 1 Cumming, Cas. Priv. Corp. 468; *Robinson v. Smith*, 3 Paige (N. Y.) 222; *Land, Log & L. Co. v. McIntyre*, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915, and cases cited in note 205, *infra*.

arising out of technical rules respecting the mode in which corporations are required to sue, and will entertain a suit by stockholders individually.²⁰⁴ Therefore it is well settled that if the majority of the stockholders do or threaten to do acts which are ultra vires of the corporation, or which constitute a violation of the rights of the other stockholders, and the directors cannot or will not take steps to redress or prevent the wrong; or if the directors or other officers do or threaten such acts, and the majority of the stockholders participate or acquiesce; or if a stranger inflicts an injury, and the corporate officers and majority of the stockholders fraudulently refuse to sue for redress—a stockholder, on his own behalf, or on behalf of himself and others, may maintain a suit in equity to redress or enjoin the wrong, and the suit cannot be defeated on the ground that the injury is to the corporation, and that it ought to sue.²⁰⁵ Any other rule would allow the majority to “freeze out” the minority. They could violate the rights of the minority at their pleasure, and could put all the assets of the company into their pockets; and, as they could prevent a suit by the corporation, the minority would be without any means of redress.

²⁰⁴ Dictum of Vice Chancellor Wigram in *Foss v. Harbottle*, 2 Hare, 461, 1 Cumming, Cas. Priv. Corp. 693. And see the cases hereafter cited.

²⁰⁵ *Atwood v. Merryweather*, L. R. 5 Eq. 464, note, 1 Cumming, Cas. Priv. Corp. 717; *Simpson v. Hotel Co.*, 8 H. L. Cas. 712; *Menier v. Telegraph Works*, 9 Ch. App. 850, 1 Cumming, Cas. Priv. Corp. 722; *Booth v. Robinson*, 55 Md. 419; *Mason v. Harris*, 11 Ch. Div. 97, 1 Cumming, Cas. Priv. Corp. 731; *Russell v. Waterworks Co.*, L. R. 20 Eq. 474, 1 Cumming, Cas. Priv. Corp. 725; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401, 1 Cumming, Cas. Priv. Corp. 739; *Chicago City Ry. Co. v. Allerton*, 18 Wall. (U. S.) 233, 21 L. Ed. 902, 1 Cumming, Cas. Priv. Corp. 752; *Zabriskie v. Railroad Co.*, 23 How. (U. S.) 381, 16 L. Ed. 488; *City of Davenport v. Dows*, 18 Wall. (U. S.) 626, 21 L. Ed. 938, 1 Cumming, Cas. Priv. Corp. 754; *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827, 1 Cumming, Cas. Priv. Corp. 756; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. 747; *Peabody v. Flint*, 6 Allen (Mass.) 52, 1 Cumming, Cas. Priv. Corp. 795; *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, 2 Cumming, Cas. Priv. Corp. 234, *Shep. Cas. Corp.* 181; *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *Bailey v. Gaslight Co.*, 27 N. J. Eq. 196, 2 Cumming, Cas. Priv. Corp. 207; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Allen v. Curtis*, 26 Conn. 456; *Slattery v. Transportation Co.*, 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245; *Greaves v. Gouge*, 69 N. Y. 154; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Ogswell v. Bull*, 39 Cal. 320; *Hazard v. Durant*, 11 R. I. 195; *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577; *Schoening v. Schwenk*, 112 Iowa, 733, 84 N. W. 916; *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 South. 513; *Watkins v. North American Land & T. Co.*, 107 La. Ann. 107, 31 South. 683; *Metcalf v. American School Furniture Co. (C. C.)* 108 Fed. 909; *Pittsburg, C., C. & St. L. R. Co. v. Dodd*, 72 S. W. 822, 24 Ky. Law Rep. 2057; *Glover v. Manila Gold Min. & Mill. Co. (S. D.)* 104 N. W. 261.

To entitle a stockholder to maintain a suit in equity to redress a corporate injury from an act done or to prevent a corporate injury from an act threatened, either in his own name, or on behalf of himself and other stockholders, it must be shown that every reasonable effort to obtain redress or protection through the regularly constituted agents and controlling power of the corporation has proved unavailing. It must be made to appear from the bill, not only that the directors are disabled, by their disqualification or misconduct, to sue, or that they have wrongfully refused to do so upon a proper demand; but, where the matter will admit of the necessary delay, and it is practicable to call upon the stockholders to act, it must also be shown that this has been done.²⁰⁶ No doctrine in the law of corporations is better settled than this. The only difficulty is in its application to particular cases. It is not enough to show inability or refusal to sue on the part of the directors, but it must be shown that for some reason redress cannot be obtained by calling a meeting of the stockholders, who would have the power to direct suit to be brought in the name of the corporation, and to remove the offending directors and elect others who would institute the suit.²⁰⁷

²⁰⁶ *Foss v. Harbottle*, 2 Hare, 461, 1 Cumming, Cas. Priv. Corp. 693; *Mozley v. Alston*, 1 Phil. Ch. 790; *Russell v. Waterworks Co.*, L. R. 20 Eq. 474, 1 Cumming, Cas. Priv. Corp. 725; *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827, 1 Cumming, Cas. Priv. Corp. 756; *Allen v. Wilson* (C. C.) 28 Fed. 677; *Booth v. Robinson*, 55 Md. 419; *Brewer v. Boston Theater*, 104 Mass. 378; *Dunphy v. Association*, 146 Mass. 495, 16 N. E. 426, 1 Cumming, Cas. Priv. Corp. 769; *Mount v. Trust Co.*, 93 Va. 427, 25 S. E. 244; *Rathbone v. Gas Co.*, 31 W. Va. 798, 8 S. E. 570; *Doud v. Railway Co.*, 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620; *Hazard v. Durant*, 11 R. I. 195; *Black v. Huggins*, 2 Tenn. Ch. 780; *Blair v. Telegram Newspaper Co.*, 172 Mass. 201, 51 N. E. 1080; *Flynn v. Brooklyn City Ry. Co.*, 158 N. Y. 493, 53 N. E. 520; *Dillon v. Lee*, 110 Iowa, 156, 81 N. W. 245; *Louisville & N. R. Co. v. Neal*, 128 Ala. 149, 29 South. 865; *Ulmer v. Maine Real Est. Co.*, 93 Me. 324, 45 Atl. 41; *Wolf v. Pennsylvania R. Co.*, 195 Pa. 91, 45 Atl. 936; *Fry v. Rush*, 63 Kan. 429, 65 Pac. 701; *Kavanaugh v. Wetmore*, 103 App. Div. 95, 92 N. Y. Supp. 543. It is not enough to make a request that suit be brought, but the facts on which a suit could be maintained must be submitted. *Doherty v. Mercantile Trust Co.*, 184 Mass. 590, 69 N. E. 335.

²⁰⁷ *Foss v. Harbottle*, 2 Hare, 461, 1 Cumming, Cas. Priv. Corp. 693; *Mozley v. Alston*, 1 Phil. Ch. 790; *Rathbone v. Gas Co.*, 31 W. Va. 798, 8 S. E. 570. "In addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he

When the directors or officers of a corporation cause a loss of corporate property by negligence or culpable lack of prudence or failure to exercise their functions; or fraudulently misappropriate the corporate property in any manner, whether for their own benefit or for the benefit of a third person; or obtain any undue advantage, benefit, or profit for themselves by contract, purchase, sale, or other dealings under color of their official functions; or misuse the franchise; or violate the rules established by the charter or by-laws for their management of the corporate affairs; or in any other similar manner commit a breach of their fiduciary obligations towards the corporation, so that it sustains injury or loss, and a liability devolves upon themselves,—then the corporation is the party to sue for equitable relief, and in such cases no equitable suit for relief can be maintained against the directors or officers by the stockholder or stockholders individually, nor by a stockholder in a representative capacity on behalf of all the others similarly situated, unless the corporation either actually or virtually refuses to prosecute.²⁰⁸

The effort by a stockholder to induce the managing body of the corporation to sue must have been earnest, and not simulated.²⁰⁹ No request at all to sue need be made of the directors, nor of the stockholders as a body, if it is clear that the request would be useless,²¹⁰

fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit." *Hawes v. City of Oakland*, supra. And see "Additional Rules of Practice in Equity," No. 94, 104 U. S. ix; post, p. —; *Dickinson v. Consolidated Traction Co. (C. C.)* 114 Fed. 232; *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 458, 23 Sup. Ct. 157, 47 L. Ed. 256; 10 Cyc. 982.

²⁰⁸ *Doud v. Railway Co.*, 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620.

²⁰⁹ *Bacon v. Irvine*, 70 Cal. 221, 11 Pac. 646; *Dannmeyer v. Coleman (C. C.)* 11 Fed. 97; *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827, 1 Cumming, Cas. Priv. Corp. 756; *City of Detroit v. Dean*, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300.

²¹⁰ *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *Mack v. Iron Co.*, 90 Ala. 306, 8 South. 150, 9 L. R. A. 650; *Starbuck v. Trust Co. (Shepaug Voting Trust Cases)* 60 Conn. 553, 24 Atl. 32; *Pencille v. State Farmers' Mut. H. Ins. Co.*, 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326; *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498; *Schoening v. Schwenk*, 112 Iowa, 733, 84 N. W. 916; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 33 O. C. A. 517;

or if irreparable injury would be caused by the delay.* Thus, when the president of a corporation was its general manager, and owned a majority of the stock, it was held that a demand upon him to sue, and his refusal, was sufficient to entitle a stockholder to sue in his own name to have construction bonds of the company, unlawfully issued by the president, declared ultra vires and void.²¹¹ A stockholder, complaining of misconduct of the treasurer of a corporation, is not excused from applying to the directors to bring suit, before bringing it himself, by the fact that the treasurer owns the majority of the stock; but this fact does excuse him from applying to a stockholders' meeting.²¹² It is not enough, to excuse application to the directors or stockholders as a body, to show that they would probably refuse to take steps to obtain relief.²¹³

Acts within the Power of the Majority—Discretionary Powers.

"Nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent; unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but every litigation must be in the name of the company, if the company really desire it."²¹⁴ Obviously a stockholder, or a minority of the stockholders, cannot maintain a suit to prevent or to set aside a transaction by the majority, if the transaction is within the powers of the majority. In such a case the will of the majority must govern, and the courts will not interfere merely because a minority of the stockholders object to the transaction, and deem it injurious to the interests of the corporation. As was said by the Kentucky court, in a

Eldred v. American Palace-Car Co. (C. C.) 99 Fed. 168; Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454; McConnell v. Combination Min. & Mill. Co., 30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703. A request to sue need not be made to the directors, if they are the wrongdoers. Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 South. 371; Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746; Columbia Nat. Sand D. Co. v. Washed Sand D. Co. (C. C.) 136 Fed. 710.

* Brewer v. Boston Theater Co., 104 Mass. 378; Tevis v. Hammersmith, 31 Ind. App. 281, 66 N. E. 79, 912, affirmed 161 Ind. 74, 67 N. E. 672.

²¹¹ City of Chicago v. Cameron, supra.

²¹² Dunphy v. Association, 146 Mass. 495, 16 N. E. 426, 1 Cumming, Cas. Priv. Corp. 769; Ziegler v. Lake Street El. R. Co., 76 Fed. 662, 22 C. C. A. 465. And see Allen v. Wilson (C. C.) 28 Fed. 677.

²¹³ Foote v. Mining Co. (C. C.) 17 Fed. 46. See, also, Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 21 South. 315, 59 Am. St. Rep. 140; Slegman v. Maloney, 65 N. J. Eq. 372, 54 Atl. 405.

²¹⁴ Macdougall v. Gardiner, 1 Ch. Div. 13, 1 Cumming, Cas. Priv. Corp. 704.

suit for an injunction, relief will not be granted unless the corporation, represented by the majority, is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution; for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders. Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation.²¹⁵

If the majority of the stockholders are abusing their powers, and are depriving the minority of their rights, the minority may, in a proper case, come into a court of equity, and sue in their own names to maintain their rights. But they cannot sue to set aside something which the majority were entitled to do, though it may have been done irregularly. "If the thing complained of is a thing which, in substance, the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally," the court will not interfere at the suit of individual stockholders.²¹⁶

It has been held, under this doctrine, that a stockholder in a corporation, the charter of which is subject to amendment or repeal at the pleasure of the legislature, cannot maintain a suit to restrain the corporation from engaging in a new enterprise, in addition to that contemplated by the charter, but of the same kind, if it is sanctioned by an express legislative grant, and by a vote of the majority of the stockholders.²¹⁷ As to this proposition, however, there is much doubt. Perhaps the weight of authority is against it.²¹⁸

²¹⁵ *Dudley v. High School*, 9 Bush (Ky.) 576, 1 Cumming, Cas. Priv. Corp. 767. And see *Foss v. Harbottle*, 2 Hare, 461, 1 Cumming, Cas. Priv. Corp. 693; *Durfee v. Railroad Co.*, 5 Allen (Mass.) 230, 1 Cumming, Cas. Priv. Corp. 773; *Bill v. Telegraph Co.* (C. C.) 16 Fed. 14; *Meredith v. New Jersey Zinc & I. Co.*, 59 N. J. Eq. 257, 44 Atl. 55, affirmed 60 N. J. Eq. 445, 50 Atl. 1119; *Trimble v. American Sugar R. Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Metcalf v. American School F. Co.* (C. C.) 122 Fed. 115. See ante, p. 339, for the application of this principle to suits by stockholders to compel the corporation to declare and pay a dividend.

²¹⁶ *Macdougall v. Gardiner*, 1 Ch. Div. 18, 1 Cumming, Cas. Priv. Corp. 704. Per Mellish, L. J.

²¹⁷ *Durfee v. Railroad Co.*, 5 Allen (Mass.) 230, 1 Cumming, Cas. Priv. Corp. 773.

²¹⁸ Compare *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, 1 Cumming, Cas. Priv. Corp. 781. See ante, p. 320, and post, p. 433, where the cases are referred to.

A stockholder, or a minority of the stockholders, cannot maintain a suit to set aside a transaction entered into by the directors fraudulently or in excess of their authority, if it is one which a majority of the stockholders may lawfully ratify, and thus render binding as against the minority. In *Foss v. Harbottle*²¹⁹ the complaint in a suit by stockholders was that the directors had fraudulently purchased land from themselves for the corporation at an excessive price. Vice Chancellor Wigram held that the suit could not be maintained, since the transaction, though subject to rescission by the corporation, was not void, but might be ratified by a majority of the members.²²⁰

Even when it is clear that a corporation has a right to sue to redress or enjoin wrongs committed or threatened, the fact that it refuses to do so does not necessarily entitle a stockholder to sue on behalf of himself and the other stockholders. As a rule, the courts will not interfere at the suit of a stockholder to obtain redress for an injury to the corporation, because of failure or refusal of the directors, or of the majority of the stockholders, to sue. It is only when the action of the corporation in refusing to proceed at the request of a stockholder is fraudulent as against him, or in disregard of his rights, that he can maintain a suit in his own name in the corporate right. The court cannot interfere with the management of corporations in matters which are properly within their discretion, so long as their discretion is fairly exercised; and it is always assumed, until the contrary appears, that they and their officers obey the law, and act in good faith towards all their members.²²¹ It is generally discretionary with a corporation whether it will sue for injuries suffered by it; and, so long as it acts fairly in refusing to sue, the courts will not entertain a suit by an individual stockholder. "It is not always best to insist upon all one's rights; and a corporation, acting by its directors, or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted. In such a case the will of the majority must control."²²² So when a suit

²¹⁹ 2 Hare, 461, 1 Cumming, Cas. Priv. Corp. 693.

²²⁰ And see *Bill v. Telegraph Co.* (C. C.) 16 Fed. 14; *Kessler Co. v. Ensley Co.* (C. C.) 129 Fed. 397.

²²¹ Per Knowlton, J., in *Dunphy v. Association*, 146 Mass. 495, 16 N. E. 426, 1 Cumming, Cas. Priv. Corp. 769.

²²² *Dunphy v. Association*, *supra*; *Hendrickson v. Bradley*, 85 Fed. 508, 29 C. C. A. 303; *Kessler v. Ensley Co.* (C. C.) 123 Fed. 546. "There may be a great many wrongs committed in a company,—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company,

is brought against a corporation, it is ordinarily within the discretion of the directors whether or not to defend.²²³ A stockholder will be permitted, however, to intervene and defend an action brought against the corporation, where it is made to appear that its directors or managing agents are wilfully or fraudulently neglectful of its interests.²²⁴

The Rule as Stated by the United States Supreme Court.

In *Hawes v. City of Oakland*²²⁵ the supreme court of the United States thus states the doctrine governing suits by stockholders:

"We understand that doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit:

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction, completed or contemplated, by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting

which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done." Per Sir W. M. James, L. J., in *Macdougall v. Gardiner*, 1 Oh. Div. 13, 1 Cumming, Cas. Priv. Corp. 704.

²²³ *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712; *Stradley v. Pallthorp*, 96 Mich. 287, 55 N. W. 807; *Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. Ry. Co.* (C. C.) 67 Fed. 49; *General Electric Co. v. West Asheville Imp. Co.* (C. C.) 73 Fed. 386; *Meyer v. Bristol Hotel Co.*, 163 Mo. 59, 63 S. W. 96.

²²⁴ *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 260, 48 N. W. 1124; *Home Mining Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756; *Fitzwater v. National Bank of Seneca*, 62 Kan. 163, 61 Pac. 684, 84 Am. St. Rep. 377; *Shively v. Eureka T. G. M. Co.*, 129 Cal. 293, 61 Pac. 939. Cf. *Gunderson v. Illinois Trust & S. Bank*, 199 Ill. 422, 65 N. E. 326. Where one railroad corporation purchased a majority of the stock in another for the purpose of controlling it, and purposely so mismanaged its affairs as to cause a default in the payment of a mortgage upon its property, and in pursuance of its plan to secure control caused suit to be brought to foreclose the mortgage, minority stock-holders were permitted to become parties defendant and to show that the foreclosure was in fraud of their rights. *Farmer's Loan & T. Co. v. New York & N. Ry. Co.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689.

²²⁵ 104 U. S. 450, 26 L. Ed. 827, 1 Cumming, Cas. Priv. Corp. 756. And see *Dimpfell v. Ohio & M. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121, 1 Cumming, Cas. Priv. Corp. 765; *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 458, 23 Sup. Ct. 157, 47 L. Ed. 256.

for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers; but the foregoing may be regarded as an outline of the principles which govern this class of cases.

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

Who May Sue As Stockholders.

A stockholder may sue on behalf of himself and other stockholders, notwithstanding that he was not the owner of the stock at the time of the transaction of which he complains,²²⁶ and even if he purchased his stock for the purpose of bringing suit.²²⁷ It is otherwise, however,

²²⁶ Winsor v. Bailey, 55 N. H. 218; Parsons v. Joseph, 92 Ala. 403, 3 South. 788; Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 South. 1006; Forrester v. Butte & M. Consol. Copper & Silver Min. Co., 21 Mont. 544, 55 Pac. 229, 358. Contra: Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716; O'Connor v. Virginia Passenger & P. Co., 46 Misc. Rep. 530, 92 N. Y. Supp. 525.

²²⁷ Seaton v. Grant, L. R. 2 Ch. App. 459; Bloxam v. Metropolitan Ry., L. R. 3 Ch. 337; Ramsey v. Gould, 57 Barb. (N. Y.) 398. "The plaintiff had in a collateral way lost some money, and he then finds a blot in the management of the company of which he thinks the shareholders might complain. He buys five shares in the company, and then files this bill, in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this court, or, indeed, in any other court, and such conduct might be material at the hearing with reference to the amount of relief which the plaintiff could obtain, or whether

in the federal courts, where, in order to guard against collusion in bringing cases within the jurisdiction resting on diversity of citizenship, the following rule has been adopted: "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."²²⁸

Laches and Estoppel.

A stockholder may be precluded by acquiescence, laches, or estoppel from bringing suit to redress injuries to the corporation by the directors, or other officers, or by the majority of the stockholders, or by third persons; for such suits are subject to the familiar principle of equity jurisprudence that acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the court to refuse him relief.²²⁹ Thus it was

he was entitled to any relief at all. But the question is whether these facts are necessarily fatal to the plaintiff's claim to relief. Suppose an answer were put in admitting all the allegations contained in the bill, it would be difficult to say at this stage of the suit that the plaintiff's conduct would altogether disentitle him to relief." Per Lord Cairns, L. J., in *Seaton v. Grant*, supra.

²²⁸ Equity Rule No. 94, 104 U. S. ix. See *Cook, Corp.* § 737.

²²⁹ *Dunphy v. Association*, 146 Mass. 495, 16 N. E. 426, 1 Cumming, Cas. Priv. Corp. 769; *Dimpfell v. Railway Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121, 1 Cumming, Cas. Priv. Corp. 765; *Allen v. Wilson* (C. C.) 28 Fed. 677; *Boyce v. Coal Co.*, 37 W. Va. 73, 16 S. E. 501; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; *Peabody v. Flint*, 6 Allen (Mass.) 54; *Gregory v. Patchett*, 33 Beav. 595; *Ashhurst's Appeal*, 60 Pa. 290; *Watt's Appeal*, 78 Pa. 370; *Stewart v. Transportation Co.*, 17 Minn. 372 (Gil. 348); *Burt v. British, etc., Ass'n*, 4 De G. & J. 158; *Post v. Beacon Vacuum Pump & E. Co.*, 84 Fed. 371, 28 C. C. A. 431; *Clark v. Pittsburg Nat. Gas Co.*, 184 Pa. 188, 39 Atl. 86; *Wills v. Porter* (Cal.) 61 Pac. 1109; *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731. In a suit by minority stockholders to compel restoration to the corporation of moneys received by an officer in excess of his salary, where one of the complainants is debarred from relief by acquiescence in such misappropriation, equity will treat the excessive salary as a fund, giving to the innocent stockholders their proportion, and leaving the balance in the hands of him to whom it was appropriated by his co-wrongdoers. *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863.

held in a late Massachusetts case that a stockholder could not bring suit for improper investments of corporate funds, made three years before, if he knew of them at the time, and did not object.²²⁰ And it has often been held that a stockholder is estopped to object to corporate acts done with his consent.²²¹

One who purchases with notice of acquiescence on the part of his transferror is also precluded from bringing suit.²²² And it has been held that an innocent transferee stands in no better position in this respect than his transferror;²²³ but there are some decisions to the contrary.²²⁴

Motive of Stockholder.

Ordinarily, the motive of a stockholder in suing to restrain ultra vires acts by the corporation is immaterial. But he must come in a bona fide character as a stockholder. In *Forrest v. Manchester S. & L. Ry. Co.*,²²⁵ the plaintiff, who held a small amount of stock in the defendant company, sued to enjoin acts alleged to be ultra vires. It appeared that the other stockholders were opposed to the suit, and that another corporation, in which the plaintiff was a larger stockholder, directed him to institute it, and had indemnified him against costs, and that the suit was really in the interests of this company. It was held, without deciding whether the acts complained of were ultra vires, that the suit, not being instituted by the plaintiff in a bona fide character as a stockholder, was an imposition on the court, and could not be maintained.²²⁶

Parties to Suits.

A suit in equity by a stockholder to redress or enjoin injuries to the corporation can only be maintained on the ground that the rights

²²⁰ *Dunphy v. Association*, *supra*. Cf. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

²²¹ See the cases cited above.

²²² *Clark v. American Coal Co.*, 86 Iowa, 486, 53 N. W. 291, 17 L. R. A. 557.

²²³ *Parsons v. Hayes*, 14 Abb. N. C. (N. Y.) 419; *Clark v. American Coal Co.*, *supra*; *Erny v. G. W. Schmidt Co.*, 197 Pa. 475, 47 Atl. 877; *Trimble v. American Sugar R. Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 90, 53 Atl. 601; *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716; *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731.

²²⁴ *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788; *Warren v. Robison*, 25 Utah, 205, 70 Pac. 989. And see *London Trust Co. v. Mackenzie*, 68 L. T. (N. S.) 880.

²²⁵ 4 De Gex, F. & J. 125, 1 Cumming, Cas. Priv. Corp. 713.

²²⁶ And see *Waterbury v. Express Co.*, 50 Barb. (N. Y.) 157; *Jenkins v. Auburn City Ry.*, 27 App. Div. 553, 50 N. Y. Supp. 852; *Watson v. Le Grand*, 177 Ill. 203, 52 N. E. 817.

of the corporation are involved; and the suit should be so conducted that any decree on the merits will be binding upon the corporation. It is therefore necessary to make the corporation a party defendant. It would be wrong, in case the stockholder were unsuccessful in his suit, to allow the corporation to renew the litigation in another suit; and to avoid this result a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it be made a party to the suit.²³⁷

Where the subject-matter of the complaint is fraud or misconduct on the part of the directors or other officers of the corporation, they also must be made defendants.²³⁸

If the subject-matter of the suit is an agreement between the corporation, acting by its directors or managers, and some other corporation, or some other person, strangers to the corporation, it is proper to make that other corporation or person a defendant to the suit; and the court may grant relief against such corporation or person, as by compelling it to return money or property received under the agreement, if it was ultra vires or fraudulent.²³⁹

²³⁷ *Davenport v. Dows*, 18 Wall. (U. S.) 626, 21 L. Ed. 938, 1 Cumming, Cas. Priv. Corp. 754. And see *Hersey v. Veazle*, 24 Me. 9, 41 Am. Dec. 364; *Greaves v. Gouge*, 69 N. Y. 154; *Black v. Huggins*, 2 Tenn. Ch. 780; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Allen v. Curtis*, 26 Conn. 456; *Mount v. Trust Co.*, 93 Va. 427, 25 S. E. 244. The decision of questions litigated in a suit brought by a stockholder in his own behalf and in behalf of other stockholders, in which the corporation is made defendant and appears, is conclusive in another suit brought by another stockholder for the purpose of relitigating the questions which have been determined. *Willoughby v. Chicago Junction R. & U. S. Co.*, 50 N. J. Eq. 656, 25 Atl. 277. Stockholders in a foreign corporation may maintain a suit for property of the corporation in the state, though it is not served with process in the state and does not appear. *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574. If the corporation has been declared insolvent, and the statutory receiver, appointed by the court where the suit is pending, be made a party, the corporation need not be joined. *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

²³⁸ *Slattery v. Transportation Co.*, 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245. Cf. *Eldred v. American Palace Car Co.* (C. C.) 99 Fed. 168.

²³⁹ *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474, 1 Cumming, Cas. Priv. Corp. 725; *Salomons v. Laing*, 12 Beav. 377; *Peabody v. Flint*, 6 Allen (Mass.) 52, 57, 1 Cumming, Cas. Priv. Corp. 795. And see *Pittsburg, C., C. & St. L. Ry. Co. v. Dodd*, 72 S. W. 822, 24 Ky. Law Rep. 2057; *Edwards v. Mercantile Trust Co.* (C. C.) 124 Fed. 381; *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 87 South. 871; *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486.

EXPULSION OF MEMBERS.

152. Corporations not having a joint stock have, as an incident, power to remove or expel members for sufficient cause. This right does not exist in joint-stock corporations. When the charter is silent on the subject, or grants the power in general terms, it can be exercised only for the following causes:

- (a) Offenses of an infamous character, and indictable at common law, and of which the party has been convicted.**
- (b) Offenses against the party's duty to the corporation as a member of it.**
- (c) Offenses compounded of these two.**

Joint-stock corporations and corporations organized for gain have no power to remove or expel their stockholders, unless the power to do so is expressly conferred upon them by charter or by agreement with their members.²⁴⁰ In the case of other corporations, however, they have the power to remove members for good cause, provided they do not thereby violate charter or statutory provisions. This power need not be expressly conferred by the charter. It is an incident to every corporation other than a joint-stock corporation.²⁴¹ Questions as to the nature and extent of this power have frequently arisen in connection with incorporated clubs, literary and medical societies, benevolent societies, boards of trade, etc.

The power can only be exercised for good cause, and it must be for some offense that has an immediate relation to the duties of the party as a member, or for an offense of an infamous character, indictable at law, and of which the party has been convicted. And a by-law or rule authorizing expulsion for a less cause is void.²⁴² "It appears to be well settled that when the charter of a corporation is silent upon the subject of expulsion, or grants the power in general terms, there are but three legal causes of disfranchisement: (1) Offenses of an infamous character indictable at common law. (2) Offenses against the corporator's duty to the corporation as a member of it. (3) Offenses compounded of the two."²⁴³

²⁴⁰ See *Edgerton Tobacco Manuf'g Co. v. Croft*, 69 Wis. 256, 34 N. W. 143; *Pulford v. Fire Department*, 31 Mich. 465.

²⁴¹ 2 Kent, Comm. 297; 1 Thomp. Corp. 847; *Lord Bruce's Case*, 2 Strange, 819; *Rex v. Richardson*, 1 Burrows, 517; *Dickenson v. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544; *Fawcett v. Charles*, 13 Wend. (N. Y.) 473.

²⁴² 2 Kent, Comm. 297; *Com. v. Society*, 2 Bin. (Pa.) 441, 4 Am. Dec. 453; *New York Protective Ass'n v. McGrath* (Super. N. Y.) 5 N. Y. Supp. 8; *Otto v. Union*, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

²⁴³ *State v. Chamber of Commerce*, 20 Wis. 63, 71; *Dickenson v. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544; *Evans v. Philadelphia Club*, 50 Pa. 107. See 1 Thomp. Corp. §§ 849-876, collecting the cases.

A member may be expelled from a board of trade for violating a by-law ²⁴⁴ prohibiting members, under penalty of expulsion, from making any contract for the future delivery of produce before the time fixed for opening the exchange room, or after the time fixed for closing the same; ²⁴⁵ or from making or reporting any false or fictitious purchase or sale, or from acting in bad faith or dishonestly. ²⁴⁶ So a by-law of a board of trade or similar corporation may authorize expulsion of a member for nonfulfillment of any contract. ²⁴⁷

On the other hand, it has been held that a by-law of a benevolent society, authorizing expulsion of a member for vilifying any of the other members, is void, as such conduct does not affect the interest or good government of the corporation, and is not indictable by the law of the land. ²⁴⁸

If a member is guilty of an offense which renders him liable to indictment, but which has no immediate relation to the corporation or his duties as a member, he cannot be expelled therefor until his guilt is established by an indictment and trial at law. ²⁴⁹

If there is no special provision on the subject in the charter, the power of removal of a member for cause is in the whole body, and not in the board of managers or other officers. ²⁵⁰ But a select body of the corporation, as the board of directors may possess the power, not only when it is given by the charter, but in consequence of a by-law made by the body at large, for the body at large may thus delegate the power to its agents or managing body. ²⁵¹

²⁴⁴ Such by-law must be within the limits of the charter and reasonable, and must not be inconsistent with law or public policy. *People v. Chicago Live Stock Ex.*, 170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 62 Am. St. Rep. 404; *Green v. Board of Trade*, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365.

²⁴⁵ *State v. Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

²⁴⁶ *Pitcher v. Board of Trade*, 121 Ill. 412, 13 N. E. 187; *Board of Trade v. Nelson*, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312; *Wood v. Chamber of Commerce*, 119 Wis. 367, 98 N. W. 835.

²⁴⁷ *Dickenson v. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544; *Haebler v. New York Produce Exchange*, 149 N. Y. 414, 44 N. E. 87; *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84 ("fraudulent breach of contract, or any proceedings inconsistent with just or equitable principles of trade").

²⁴⁸ *Com. v. Society*, 2 Bin. (Pa.) 441, 4 Am. Dec. 453.

²⁴⁹ 2 Kent, Comm. 297; *Com. v. St. Patrick's Society*, 2 Bin. (Pa.) 441, 4 Am. Rep. 453.

²⁵⁰ 2 Kent, Comm. 298; *State v. Chamber of Commerce*, 20 Wis. 63.

²⁵¹ 2 Kent, Comm. 298; *Pitcher v. Board of Trade*, 121 Ill. 412, 13 N. E. 187; *State v. Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760. Where one appears before the board of directors of an association charged with violating its rules, and submits his case to them without objection to the manner in which the body is constituted, or the mode of its proceeding, all irregularities therein are deemed to be waived. *Pitcher v. Board of Trade*, *supra*.

Strictly speaking, the term "amotion" applies only to officers. "Disfranchisement" is the term applied to the removal or expulsion of members.²⁵²

"It is absolutely essential to the validity of the suspension or expulsion of a member of an incorporated society that the accused should be notified of the charges against him, and of the time and place set for their hearing; that the accusing body should proceed upon inquiry, and consequently upon evidence; and that the accused should have a fair opportunity of being heard in his defense."²⁵³ And, generally, there must be a regular sentence of expulsion.²⁵⁴ These rules do not apply to mutual benefit corporations whose charter or by-laws provide that nonpayment of an assessment after notice shall, ipso facto, work a forfeiture of membership or of the member's benefit certificate.²⁵⁵ Nor does the rule quoted apply where the member becomes a nonresident, so that it is impracticable to give him notice.²⁵⁶

In expelling members the corporation or its authorized board acts in a quasi judicial character, and, so long as it confines itself to the exercise of the powers vested in it, and in good faith pursues the method prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal.²⁵⁷ The courts, however, will decide whether there were sufficient grounds for expulsion, and whether the power has been lawfully exercised, and they will interfere with the sentence if there was not sufficient cause for expulsion; or if the decision arrived at was contrary to natural justice; as where the member was not given an opportunity to be heard, or if the rules of the company were not observed, or if the action of the company was malicious, and not bona fide.²⁵⁸

²⁵² 2 Kent, Comm. 298.

²⁵³ 1 Thomp. Corp. § 881. See Id. §§ 882-899. See *Green v. Board of Trade*, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; *Weiss v. Musical Mut. Protective Union*, 189 Pa. 446, 42 Atl. 118, 69 Am. St. Rep. 820; *People v. East Buffalo Live Stock Ass'n* (Sup.) 84 N. Y. Supp. 795. Cf. *People v. Old Guard of City of New York*, 87 App. Div. 478, 84 N. Y. Supp. 766.

²⁵⁴ 1 Thomp. Corp. § 898.

²⁵⁵ 1 Thomp. Corp. §§ 881, 898.

²⁵⁶ 1 Thomp. Corp. § 881.

²⁵⁷ *Otto v. Union*, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; *Com. v. Pike Beneficial Soc.*, 8 Watts & S. (Pa.) 250; *Burt v. Lodge*, 66 Mich. 85, 33 N. W. 18; *Robinson v. Lodge*, 86 Ill. 598; *Pitcher v. Board of Trade*, 121 Ill. 412, 13 N. E. 187; *Board of Trade v. Nelson*, 162 Ill. 431, 44 N. E. 748, 53 Am. St. Rep. 312.

²⁵⁸ *Otto v. Union*, *supra*; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84; *De Hart v. Good Will Hook & Ladder Co.*, 61 N. J. Law, 507, 40 Atl. 570; and cases cited in notes 246, 247, 253, 257, *supra*.

If a member of a corporation is wrongfully expelled, and denied rights of membership, mandamus is a proper remedy to compel his reinstatement.²⁵⁹ In some states the remedy by injunction is allowed, while in others it is denied, generally, on the ground that there is an adequate remedy at law by mandamus.²⁶⁰ The regularity of the proceedings and the sufficiency of the evidence in case of expulsion of a member after notice, trial, and conviction cannot be inquired into collaterally.²⁶¹

²⁵⁹ 1 Thomp. Corp. § 904; *State v. Chamber of Commerce*, 20 Wis. 63; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 8 N. W. 760; *Otto v. Union*, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; *Black & White Smiths' Society v. Vandyke*, 2 Whart. (Pa.) 309; *De Hart v. Good Will Hook & Ladder Co.*, 61 N. J. Law, 507, 40 Atl. 570; *Weiss v. Musical Mut. Protective Union*, 189 Pa. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

²⁶⁰ 1 Thomp. Corp. §§ 909-913. Equity will not interfere on the ground that a member will not have a fair hearing by the officers of the corporation authorized to discipline him. *Wood v. Chamber of Commerce*, 119 Wis. 867, 96 N. W. 885. Cf. *Bartlett v. L. Bartlett & Son Co.*, 116 Wis. 450, 93 N. W. 473.

²⁶¹ *Black & White Smiths' Society v. Vandyke*, 2 Whart. (Pa.) 309, 30 Am. Dec. 263.

CHAPTER XII.**MEMBERSHIP IN CORPORATIONS (Continued).**

- 153-154. Transfer of Shares.
- 155. Effect of Transfer.
- 156. Lien of Corporation on Shares.
- 157-158. Validity of Transfers.
- 159-160. Mode of Transfer.
- 161-162. Registration of Transfer.
- 163-166. Forged and Unauthorized Transfers.
- 167. Liability of Indorser of Forged Certificate.
- 168-169. Liability of Corporation Arising from Unauthorized or Invalid Transfer.
- 170-171. Liability of Corporation on Certificates Issued Fraudulently, without Authority, etc.
- 172. Remedy against Corporation for Refusal to Recognize Transfer.
- 173. Compelling Corporation to Issue New Certificates.

TRANSFER OF SHARES.

- 153. Except in so far as they may be restricted by charter or statutory provisions, or by an authorized by-law, or by contract, stockholders have an absolute right to transfer their shares in good faith to any one who is capable in law of taking and holding the same, and of assuming liability in respect thereto; and this right is in no way dependent upon the consent of the corporation or of its officers or the other stockholders.
- 154. An agreement between the stockholders of a corporation not to sell, pledge, or transfer their shares is in unreasonable restraint of trade, and void.

By the charters of private corporations, the shares of stock are often expressly declared to be transferable by the holders, but express provision is not at all necessary to give the right of transfer. It exists at common law. In ordinary partnerships, as we have seen, the consent of all the partners to the admission or retirement of a member is necessary, and every such change in membership involves the dissolution of the old firm and the formation of a new one. In corporations, however, it is different. One of the very objects of incorporation is to avoid this doctrine of the law of partnership. In the absence of express statutory restrictions, it is always implied that shares of stock are transferable. Subject to the limitations hereafter shown, it is well settled that a stockholder has an absolute right incident to his ownership, to make an actual and bona fide sale and transfer of his shares to any person who is capable in law of taking and holding them, and of assuming liability as a stockholder. And, in the absence of express

restrictions in the charter or in some statute, or by contract, the right is not in any way dependent upon the consent of the directors or of the other stockholders. Unless the power to do so is expressly conferred by the legislature creating the corporation, or by an authorized amendment of its charter, neither the directors nor a majority of the stockholders can, directly or indirectly, prohibit or refuse to recognize bona fide transfers.¹ For instance, a by-law, not expressly authorized by the legislature, to the effect that the validity of a transfer shall depend upon the approval and acceptance of the board of directors, while it may perhaps be lawfully enforced to protect the rights of the corporation, and prevent transfers to irresponsible persons, cannot be enforced so as to defeat the rights of a bona fide and responsible purchaser of shares. "Its enforcement," said the Iowa court, "would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate."² So, it has been held that a by-law, providing that, if any stockholder shall desire to dispose of his stock, he shall give written notice of his intention to sell, and of the price he can obtain, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, is an invalid restraint or alienation.* So it has been held that, in the absence of express authority, a by-law providing that no stockholder shall transfer his stock to any person, unless he shall first offer it to the corporation and it shall have refused to purchase it, is invalid.† But it seems that, although such a by-law may be void, a stockholder may enter into a contract with the corporation whereby he will be bound by conditions requiring him to offer his shares to the corporation before he shall have the right to sell them to another, and

¹ *Johnson v. Lafin*, 5 Dill. (U. S.) 65, Fed. Cas. No. 7,393, 1 Cumming, Cas. Priv. Corp. 608, affirmed 103 U. S. 800, 26 L. Ed. 532; *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398; *Moore v. Bank*, 52 Mo. 377; *Bank v. Lanier*, 11 Wall. (U. S.) 369, 20 L. Ed. 172; *Weston's Case*, 4 Ch. App. 20; *Gilbert's Case*, 5 Ch. App. 559; *Driscoll v. Manufacturing Co.*, 59 N. Y. 96; *Bank of Atica v. Manufacturers' & Traders' Bank*, 20 N. Y. 501; *Chouteau Spring Co. v. Harris*, 20 Mo. 383; *Kinnan v. Sullivan County Club*, 26 App. Div. 213, 50 N. Y. S. 95.

² *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398. See, also, *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203. And see post, p. 442, and cases there cited.

* *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373; *Brinkerhoff-Farris Trust & S. Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *Herring v. Ruskin Co-op. Ass'n* (Tenn. Ch. App.) 52 S. W. 327.

† *Ireland v. Globe Milling & R. Co.*, 19 R. L. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756.

the fact that the conditions are contained in an invalid by-law will not render his agreement void.†

A provision in the charter of a corporation that the shares shall be transferable on the books of the corporation in such manner as the directors shall provide, as is provided in the national banking act, is merely for the purpose of enabling the corporation to know who are stockholders, and, as such, entitled to vote, receive dividends, etc., and for the protection of bona fide purchasers of shares, and of creditors and persons dealing with the corporation, and does not in any way restrict the right of the stockholders to sell and transfer their shares, or clothe the corporation or its officers with the power to refuse to register bona fide transfers.*

† In *New England Trust Co. v. Abbott*, 162 Mass. 148, 88 N. E. 432, 27 L. R. A. 271, where it was held that where a stockholder purchases certificates of stock which provide that they are transferable only to the company, and at an appraisal to be made by its directors, as provided in the by-laws printed on the back of the certificates, and signs a receipt therefor, "subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform," he is bound by the provisions of the certificates, though, when considered as by-laws, they may be void, and that the company may enforce specific performance. The court said: "The defendant contends that these by-laws are void. We have not found it necessary to consider that question, and we express no opinion upon it. We think that the case may well stand on the ground that the defendant's testator entered into an agreement with the plaintiff to do what the plaintiff now seeks to compel his executor to do. It is manifest that a stockholder may make a contract with a corporation to do or not to do certain things in regard to his stock, or to waive certain rights, or to submit to certain restrictions respecting which the stockholders might have no power of compulsion over him. * * * In the present case the certificates were issued to the defendant's testator in consideration of the payment by him to the corporation of the amount due for the stock, and of the agreements with it on his part which they contained. By accepting them without objection, and by signing the receipts, he must be held to have agreed to the conditions printed on the backs of the certificates. The fact that the conditions were contained in the by-laws, which may have been invalid as such, does not render his agreement void, if the contract was in substance one which the corporation had power to make. We think that it had such power. It is held in this state that a corporation, unless prohibited, may purchase its own stock; and we see nothing opposed to public policy in such an agreement as this, with corporations like this. If honestly carried out by the directors, it tends to secure a trustworthy body of stockholders, from which those having the care and management of the affairs of the corporation naturally would be selected. It certainly cannot be contrary to public policy that the managers of this and similar institutions should be persons of skill who possess the confidence of the public. The restraint upon alienation is no greater than is often agreed to." See, also, *Ellen v. Rand*, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618; *Barrett v. King*, 181 Mass. 476, 68 N. E. 934.

* *Johnson v. Lafin*, 5 Dill. (U. S.) 65, Fed. Cas. No. 7,393, 1 Cumming, Cas. Priv. Corp. 608, affirmed 103 U. S. 800, 26 L. Ed. 532.

Power to refuse to assent to or register a transfer, or power to prescribe the manner of transfer, is often given to the directors by the act of incorporation. Even in such a case, however, the power must be exercised in a reasonable manner and bona fide, and there must be some good reason for refusing to recognize or register a transfer. "The power," said Mr. Justice Field, "can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers, or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions, or make it dependent upon the consent of the directors or other stockholders."⁴ Power given by the charter to regulate transfers does not give the power to restrain transfers, or prescribe to whom they may be made, but merely gives the power to prescribe formalities to be observed in making them.⁵ The mere fact that the purchaser of shares is a business rival of the corporation, and hostile to it, does not affect his rights as transferee, and is no ground for refusal of a court of equity to compel the corporation to register the transfer.⁶

The directors of a corporation have the same right as any other stockholder to make a bona fide sale and transfer of their shares, and thus get rid of liability, if they comply with the regulations, and take no advantage of their position to commit fraud.⁷ There is nothing to prevent a transfer to an officer of the corporation, as the president or a director; and, if the transfer is in good faith, it will prevail as against any claim of the corporation against the transferrer, unless there is some charter or statutory provision to the contrary.⁸

It has been held that the stockholders in a corporation cannot make a valid agreement among themselves not to transfer their shares, and that such an agreement, being in unreasonable restraint of trade, would be contrary to public policy, and void. In *Fisher v. Bush* ⁹ a number of stockholders entered into an agreement for the expressed purpose of mutual protection, and to prevent a sale of the company's franchise by a majority of the members of the board of directors, who represent-

⁴ *Johnson v. Lafin*, supra, and cases there cited and referred to.

⁵ *Chouteau Spring Co. v. Harris*, 20 Mo. 383. The requirement of a small fee for making the transfer is not unreasonable. *Glesen v. London & Northwest Am. Mtg. Co.*, 102 Fed. 584, 42 C. C. A. 515.

⁶ *Rice v. Rockefeller*, 134 N. Y. 174, 31 N. E. 907, 17 L. R. A. 237, 30 Am. St. Rep. 658, 2 Cumming, Cas. Priv. Corp. 181.

⁷ *Johnson v. Lafin*, supra; *Gilbert's Case*, 5 Ch. App. 559; *Ex parte Little-dale*, 9 Ch. App. 257.

⁸ *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398.

⁹ 35 Hun (N. Y.) 641. A contract whereby the promoters of a corporation apportioned their respective interests in the stock, and agreed that a certain

ed a minority of the shares, by which they agreed not to "sell, assign, set over, pledge, or give power of attorney to vote" their stock, without the consent of all the parties to the agreement. The agreement was held void because, for one reason, it was in restraint of trade and against public policy.

EFFECT OF TRANSFER.

155. By the weight of authority, when a valid and complete transfer of shares is made in good faith, and in accordance with the principles to be explained in subsequent sections, and there are no charter or statutory provisions to the contrary, the transferee takes the place of the transferor as a stockholder, and acquires all the rights and assumes all the liabilities which arise after the transfer by virtue of the shares. In detail:

(a) The transferor—

- (1) In most jurisdictions, is not liable for calls made after the transfer; but he is liable for calls previously made.**
- (2) As a rule, he is no longer subject to liability as a stockholder to creditors of the corporation.**
- (3) In the absence of a special agreement with the transferee, which must be known to the corporation to be binding upon it, he is not entitled to dividends declared after the transfer, though earned before; but he is entitled to dividends declared before the transfer, though not paid nor payable until afterwards.**
- (4) He is not entitled, after the transfer, to vote at stockholders' meetings, or otherwise take any part in the management of the corporation.**

(b) The transferee—

- (1) Is liable for calls made after the transfer.**
- (2) He is, in most jurisdictions, liable to the same extent as the other stockholders to creditors of the corporation, though their claims may have arisen before the transfer.**
- (3) He is entitled to all dividends declared after the transfer, though earned before, in the absence of an agreement to the contrary with the transferor, known to the corporation.**
- (4) He is entitled to vote at stockholders' meetings, and to all other rights arising after the transfer by virtue of ownership of shares.**

We shall consider in subsequent sections the manner of making a transfer of shares, and the validity of transfers. In this section will be considered generally the effect of transfers, assuming that they are

amount was to be placed in the treasury for working capital, and that the certificates issued to themselves were to be deposited with a trust company, and not withdrawn for six months without consent of each party, or unless sufficient treasury stock should be sold to realize a certain sum, was not a restraint upon trade. "As an incident to the contract making partition of the

valid and complete. Whenever a valid and effectual transfer is made, the effect is, in general, to substitute the transferee in the place of the transferor as a member of the corporation, and to give him all the rights, and subject him to all the liabilities, arising after the transfer, to which the transferor would have been entitled or subject if the transfer had not been made.

Liability for Calls.

If the stock is not fully paid up at the time of the transfer, the transferor, by the weight of authority, is not liable for calls subsequently made, unless he is made so by express charter or statutory provisions, or by special agreement; but the liability for such calls is impliedly assumed by the transferee.¹⁰ In Pennsylvania the rule is different;¹¹ and by statute in some states, as in Virginia, the transfer-

shares," said the court, "it was competent for the parties to agree that the stock donated to the corporation, in which they had a common interest, should be first offered for sale. This was no restraint upon the business freedom of the parties, but a promotion of the general interest, by temporarily withholding from the market shares owned by individuals, in order to afford a reasonable opportunity to sell shares indirectly owned by all. The protection of the interests of all concerned, by preventing the market from suddenly becoming overcrowded, and ruinously depressed, was a reasonable, just, and honest purpose, which the law does not condemn. There was no evil tendency in the arrangement, as it simply prevented a course of action that would have brought loss both to the common and the personal interests." *Williams v. Montgomery*, 148 N. Y. 519, 48 N. E. 57.

¹⁰ 1 Mor. Priv. Corp. §§ 159-161; *Isham v. Buckingham*, 49 N. Y. 216; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Huddersfield Canal Co. v. Buckley*, 7 Term R. 36, 1 Cumming, Cas. Priv. Corp. 906; *Hartford & N. H. R. Co. v. Boorman*, 12 Conn. 530; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501; *Bend v. Bank Co.*, 6 Har. & J. (Md.) 128, 132, 14 Am. Dec. 261; *Hall v. Insurance Co.*, 5 Gill. (Md.) 484, 497; *Allen v. Railroad Co.*, 11 Ala. 437; *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246; *Sigda Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194; *Elford v. Piedmont Land I. & L. Co.*, 55 S. C. 78, 82 S. E. 758, 897.

¹¹ In Pennsylvania it is held that an original subscriber to the stock of a corporation is not discharged from liability for the amount remaining unpaid on the subscription by transferring his shares in good faith to another, unless the corporation consents to release him. See *Everhart v. Railroad Co.*, 28 Pa. 339; *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. 146; *Graff v. Railroad Co.*, 31 Pa. 489; *Messersmith v. Bank*, 96 Pa. 440. To release the transferor, in Pennsylvania, he must be released and the transferee accepted by the corporation. It is not enough for the corporation to consent to the transfer and register the same. *Messersmith v. Bank*, supra. The transferee is not liable in Pennsylvania for future calls, unless made so by express agreement or by statute. "No implication of a personal promise of the transferee to pay assessments arises. The company can indemnify themselves only by a sale of the stock, and pursuit of the original subscriber." *Franks Oil Co. v. McCleary*, 63 Pa. 317. And see *Palmer v. Mining Co.*, 34 Pa. 288. The

rors as well as the transferees of stock that is not fully paid are each made liable for any installment which may have accrued before the transfer or which may accrue afterwards.¹² The rule does not apply where the shares were issued as full paid, and the transferee is a bona fide purchaser. In such a case he is not liable for calls.¹³ For all calls made prior to the transfer, though not payable until afterwards, the transferror, and not the transferee, is liable.¹⁴ But, if such calls are not paid by the transferror, new calls may be made upon the transferee, leaving him to his remedy against the transferror.¹⁵ After a transfer has been made in such a manner as to be effective as against the corporation, the transferror is not liable for assessments authorized to be made on "stockholders" beyond the amount of their shares.¹⁶

Right to Dividends.

It is a general rule, as shown in a preceding chapter, that dividends on shares belong to the person who is the owner of them at the time they are declared, without regard to the time during which the dividends were earned, or the time when such person acquired the shares.¹⁷ In the absence of a special agreement to the contrary, therefore, dividends declared before a transfer, though not payable until afterwards, belong to the transferror, and he may sue the corporation therefor after the transfer.¹⁸ But dividends declared after the transfer, though

earlier cases were limited, however, in *Bell's Appeal*, 115 Pa. 88, 8 Atl. 177, 2 Am. St. Rep. 532, where it is said that the case of *Messersmith v. Bank*, supra, is not to be understood as a decision that the transferee of stock in a corporation which has become insolvent is not liable for the payment of the unpaid portion of the shares held by him, when the unpaid capital is required for the payment of the debts of the corporation. The rule in Ohio seems to be the same as in Pennsylvania. See *Gaff v. Flesher*, 33 Ohio St. 107, 111.

¹² See *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129; *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130; *Morris v. Glenn*, 87 Ala. 628, 7 South. 90; *White v. Green*, 105 Iowa, 176, 74 N. W. 928.

¹³ *Foreman v. Bigelow*, 4 Cliff. (U. S.) 508, Fed. Cas. No. 4,934; *Steady v. Railroad Co.*, 5 Dill. (U. S.) 348, Fed. Cas. No. 13,329; 1 *Cumming*, Cas. Priv. Corp. 957; *West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. Rep. 835; *Ingles Land Co. v. Knoxville F. I. Co.* (Tenn. Ch. App.) 53 S. W. 1111; *Easton Nat. Bank v. American Brick & T. Co.* (N. J. Ch.) 60 Atl. 54; *American Alkali Co. v. Campbell* (C. C.) 113 Fed. 398. Contra, *Garden City Sand Co. v. American Refuse C. Co.*, 205 Ill. 42, 68 N. E. 724. Ante, p. 374.

¹⁴ 1 *Mor. Priv. Corp.* § 161; *Schenectady & S. Plank-Road Co. v. Thatcher*, 11 N. Y. 102, 108; *Campbell v. American Alkali Co.*, 125 Fed. 207, 61 C. C. A. 817.

¹⁵ 1 *Mor. Priv. Corp.* § 161.

¹⁶ *Chouteau Spring Co. v. Harris*, 20 Mo. 383.

¹⁷ Ante, p. 336.

¹⁸ Id.

earned before, belong to the transferee.¹⁹ This rule may be changed by special agreement between the parties, and the agreement will be binding on the corporation if it has notice of it.²⁰ If it has not such notice, it may safely pay the dividends to the transferee.²¹

Statutory Liability of Stockholders.

As a rule, where by statute stockholders are made liable for the debts of the corporation, no liability attaches until the corporate property fails, and it becomes necessary to resort to the stockholders' liability, and such persons only as are then stockholders are subject to the liability. A valid and complete transfer of stock, therefore, in the absence of express provision to the contrary, relieves the transferror of all liability to creditors of the corporation, and the transferee becomes liable in his place. Such is the general rule; but there are some decisions to the contrary, and the peculiar provisions of particular statutes may require a different rule. The subject will be explained at length in treating of the rights and remedies of creditors.²²

Pledgees, Trustees, etc., of Shares.

Persons to whom shares have been transferred as security for debts due them from the transferror, and who appear on the registration books of the corporation as owners of the shares, have the same rights as against the corporation, and are subject to the same liability to the corporation and to creditors, as if they owned the shares absolutely. And the same is true of trustees, or others in whose names the shares stand on the books, though they have no beneficial interest therein; at least if it does not appear that they hold as pledgees, trustees, etc. They are liable, for instance, to the corporation and to corporate creditors for an unpaid balance due on the shares.²³ They are also subject to the statutory liability of stockholders for debts of the corporation, and their liability is not limited to the extent of their interest.²⁴

¹⁹ *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449; *Jones v. Railroad Co.*, 57 N. Y. 196; *Jermain v. Railway Co.*, 91 N. Y. 483; *March v. Railroad Co.*, 43 N. H. 515.

²⁰ *Mor. Priv. Corp.* § 162.

²¹ *Ante*, p. 337.

²² *Post*, p. 563.

²³ *Pullman v. Upton*, 96 U. S. 828, 24 L. Ed. 818; *post*, p. 568.

²⁴ *Post*, p. 563.

LIEN OF CORPORATION ON SHARES.

156. At common law a corporation has no lien on the shares of its stockholders for debts due from them; but such a lien may be created by the charter, or by statute, or by a by-law, if there is express legislative authority therefor.

It is well settled that at common law a corporation has no lien on the shares of its stockholders for debts due to it from them.²⁵ The reason given is that a different rule would subvert the wholesome doctrine of the common law against secret liens.²⁶ It follows that the fact that a stockholder is indebted to the corporation does not of itself give the corporation any greater or different rights than any other creditors would have, and is no ground for a refusal of the corporation to recognize and register a bona fide transfer, unless a lien is given by the charter, or by statute, or by an authorized by-law.²⁷ Whether, in the absence of charter or statutory authority, a corporation may by a by-law create a lien on its shares for debts due from its stockholders, is a question upon which the courts do not entirely agree. By the weight of authority, such a by-law is binding upon the stockholders, and upon transferees who are not bona fide purchasers; but it is ineffectual as against bona fide purchasers.²⁸

The legislature may, in the charter or by statute, give a corporation a lien on shares for debts due to it by its stockholders, or may give the corporation the power to create such a lien by a by-law. In such a case a lien attaches, and a transferee of the stock will take subject to it, whether he had notice or not; and the corporation may refuse to register the transfer until the indebtedness is paid.²⁹ A provision in

²⁵ *Sargent v. Insurance Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *Massachusetts Iron Co. v. Hooper*, 7 Cush. (Mass.) 183; *Steamship Dock Co. v. Heron's Adm'r*, 52 Pa. 280; *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398; *Driscoll v. Manufacturing Co.*, 59 N. Y. 96, 102; *Bank v. Lanier*, 11 Wall. (U. S.) 369, 20 L. Ed. 172; *Heart v. Bank*, 2 Dev. Eq. (N. C.) 111; *Dana v. Brown*, 1 J. J. Marsh. (Ky.) 304; *Dearborn v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575; *Ingles Land Co. v. Knoxville Fire Ins. Co.* (Tenn. Ch. App.) 53 S. W. 1111; *Herrick v. Humphrey Hardware Co.* (Neb.) 103 N. W. 685.

²⁶ *Driscoll v. Manufacturing Co.*, 59 N. Y. 96, 102.

²⁷ See the cases cited above.

²⁸ Post, p. 443.

²⁹ *Union Bank v. Laird*, 2 Wheat. (U. S.) 390, 4 L. Ed. 269; *Brent v. Bank*, 10 Pet. (U. S.) 596, 9 L. Ed. 547; *Bishop v. Globe Co.*, 135 Mass. 132; *Dorr v. Life Insurance Clearing Co.*, 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309; *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135. Third persons are charged with notice of the provisions of articles of association required by statute to be recorded in the registry of deeds; and liens on stock created by them are binding as against third persons, though

the charter of a corporation that shares of stock shall be transferable only on the books of the corporation, according to rules established by it and all debts due and payable to the corporation by a stockholder must be satisfied before the transfer shall be made, gives the corporation a lien on shares for debts due by stockholders.⁸⁰ The lien given by statute to a corporation upon the shares of stockholders "indebted" to it, extends to all debts, whether payable presently or at a future time, except where the statute limits the lien to debts actually due and payable.⁸¹ Under the national banking act, a national bank cannot, by by-law or otherwise, acquire a lien upon the shares of its stockholders for debts due from them to the bank.⁸²

A corporation, which by its charter or otherwise is given a lien on its shares for debts due from its stockholders, may waive its rights in this respect; and, if it induces a purchaser of its shares to alter his condition in reliance upon its assurances that it has no adverse claim on the shares, it will be held to have waived any lien it may have had.⁸³

they have no actual notice thereof. *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80, 101 N. W. 735, 106 Am. St. Rep. 840.

⁸⁰ *Union Bank v. Laird*, *supra*.

⁸¹ *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. 146, 151; *National Bank v. Rochester Tumbler Co.*, 172 Pa. 614, 33 Atl. 748; *St. Paul Nat. Bank v. Life Insurance Clearing Co.*, 71 Minn. 123, 73 N. W. 713. See, also, *Bathey v. Eureka Bank*, 62 Kan. 384, 63 Pac. 437. The lien must be for a debt incurred in good faith, and will not prevail against a prior claim to the stock of which the corporation had notice when the debt was created. *Prince Inv. Co. v. St. Paul & S. C. L. Co.*, 68 Minn. 121, 70 N. W. 1079. See, also, *Bank of Kentucky v. Bonnie*, 102 Ky. 343, 43 S. W. 407. *Curtice v. Crawford County Bank (C. C.)* 110 Fed. 830; *Just v. State Bank*, 132 Mich. 600, 94 N. W. 200; *White River Sav. Bank v. Central Cap. Bank & T. Co.*, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754. The lien extends only to indebtedness directly incurred to the corporation, not to indebtedness to third persons acquired by it. *Boyd v. Reed*, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792. A claim arising out of the embezzlement of the company's funds by a stockholder as its officer is a debt. *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

⁸² *Bullard v. Bank*, 18 Wall. (U. S.) 589, 21 L. Ed. 923.

⁸³ *National Bank v. Watson town Bank*, 105 U. S. 217, 28 L. Ed. 1039; *Oakland County Sav. Bank v. State Bank*, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463. The lien is not waived by taking other security. *German Nat. Bank v. Kentucky Trust Co. (Ky.)* 40 S. W. 458. And see *Moore v. Bank*, 52 Mo. 377. The acts of an agent of the corporation relied upon as a waiver must have been within his authority or apparent authority. In *Bishop v. Globe, Co.*, 135 Mass. 132, it was held that a corporation was not estopped to assert its lien by the fact that, on the transferee's presenting the certificate for transfer, the person in charge of the transfer book promised to make the transfer and issue a new certificate as soon as a certain officer returned, it not appearing that such person had any authority, except to receive requests for transfers, and communicate them to the proper officers.

VALIDITY OF TRANSFERS.

157. A stockholder, unless restricted by the charter or by statute, may transfer his shares, and thereby cease to be liable as a stockholder, to any one who is capable of holding them, and assuming the liability of a stockholder. But, as against the corporation and its creditors,

(a) He cannot transfer his shares colorably.

(b) In this country, he cannot transfer to a man of straw, or to an insolvent person, for the purpose of escaping liability. The rule is otherwise in England.

(c) He cannot transfer to a person who is incapable in law of assuming liability with respect to the shares, as

(1) To an infant.

(2) To an insane person.

(3) To a married woman, where by the law of the particular jurisdiction she cannot assume liability.

(4) To the corporation itself, or to another corporation, if it is incapable of purchasing and holding the shares.

158. Shares are not transferable after dissolution of the corporation, so as to pass the legal title.

These questions are considered at length in a subsequent chapter in dealing with the liability of stockholders. It is the general rule that a stockholder, where there are no restrictions in the charter or in the statutes, has an absolute right to transfer his shares. This rule, however, is subject to exceptions. A transfer may be perfectly valid as between the parties themselves, and yet be invalid as against the corporation and creditors of the corporation. Thus, as we shall presently see, a stockholder cannot transfer his shares colorably to an insolvent or irresponsible person, and thereby escape liability as a stockholder to creditors of the corporation.⁸⁴ And, though in England the rule is different, in this country a stockholder cannot transfer to an insolvent person, when he knows that the corporation is insolvent, for the purpose of escaping his statutory liability, though the transaction is an out and out sale and transfer.⁸⁵ There is also an implied prohibition against a transfer of shares to an infant or any other person who is not capable in law of assuming the liabilities, as well as enjoying the rights, of the transferror in respect thereto.⁸⁶ So it is with transfers to the corporation, or to some other corporation, where it has no power to hold the shares.⁸⁷

Transfer after Dissolution.

The right of a stockholder in a corporation to sell and transfer his stock, and to pass the legal title of such stock to the purchaser, ceases

⁸⁴ Post, p. 567.

⁸⁵ Post, p. 567.

⁸⁶ Post, p. 565.

⁸⁷ Post, p. 565.

upon the dissolution of the corporation. The interests of the several stockholders are then reduced to mere equitable rights to their several distributive shares of the funds of the corporation, upon principles of justice and equity among all the stockholders; and in making distribution each stockholder is to be charged with the debts due from him to the corporation, so as to equalize the distributive shares of all the stockholders in the fund after payment of all debts due by them respectively to the corporation. When a stockholder assigns his interest after dissolution of the corporation, the assignee takes subject to this rule.⁸⁶

MODE OF TRANSFER.

159. In the absence of express regulations by the legislature, or under legislative authority, shares of stock may be transferred, and the legal title vested in the transferee, by delivery of the certificate with a written assignment thereof, or with an assignment in blank indorsed thereon.

160. The validity and completeness of a transfer depends upon the law of the state by which the corporation was created.

In the absence of a statutory or charter provision, or of a by-law passed in pursuance of legislative authority, prescribing an exclusive manner in which the stock of a corporation shall be transferred, the owner may transfer the same to a purchaser, pledgee, or donee by the delivery of the stock certificate, with a written assignment thereof. Usually the certificate contains upon its back a form of assignment, with power of attorney authorizing the transfer upon the books of the corporation. Such a transfer is sufficient at common law to convey the legal as well as the equitable title as against all persons, including the corporation.⁸⁸ The assignment may be in blank, in which case the shares will pass from person to person by delivery of the certificate, without further indorsement; the person who may be the holder of the certificate having the right at any time to fill in the blank in the assignment with his name, and to fill in his name or another's as attorney.

A valid gift of the stock may be effected by delivery of the certificate,

⁸⁸ *James v. Woodruff*, 10 Paige (N. Y.) 541, affirmed 2 Denio (N. Y.) 574.

⁸⁹ *Boston Music-Hall Ass'n v. Cory*, 129 Mass. 435, 1 Cumming, Cas. Priv. Corp. 650; *McNeill v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, 1 Cumming, Cas. Priv. Corp. 620, *W. D. Smith, Cas. Corp.* 71; *Scott v. Bank (C. O.)* 15 Fed. 494, 1 Cumming, Cas. Priv. Corp. 687; *Brittan v. Oakland Bank*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58. See, also, *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 578, 48 S. E. 226, 102 Am. St. Rep. 115.

accompanied by words of absolute and present gift, without written assignment.*

What Law Governs.

The validity of a transfer of stock in a corporation, and its sufficiency to pass title to the transferee, depend upon the law of the state by which the corporation was created, and not upon the law of the state in which the transferror and transferee reside, and the transfer is made.⁴⁰

* *Com. v. Crompton*, 137 Pa. 138, 20 Atl. 417; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429. Contra, *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054; *Baltimore Retort & F. B. Co. v. Mall*, 65 Md. 93, 8 Atl. 286. Cf. *Calkins v. Equitable Building & L. Ass'n*, 126 Cal. 531, 59 Pac. 30.

⁴⁰ *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690, 1 Cumming, Cas. Priv. Corp. 671; *Masury v. Arkansas Nat. Bank (C. C.)* 87 Fed. 381. And see *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; *Glesen v. London & Northwest Am. Mtg. Co.*, 102 Fed. 584, 42 C. C. A. 515. A decision by a state supreme court that by a donatio causa mortis the equitable title in national bank shares passed to the donee, under general principles of law, involves no federal question, and is not reviewable by the supreme court, though Rev. St. § 5139 [U. S. Comp. St. 1901, p. 3461], making such shares transferable on the books of the bank in such manner as may be prescribed by the by-laws, and the by-laws of the particular bank made the shares transferable only on its books. *Leyson v. Davis*, 170 U. S. 36, 18 Sup. Ct. 500, 42 L. Ed. 939. Under the constitution of California, providing that every business corporation organized and doing business in the state shall maintain an office therein, where transfers of stock shall be made, and providing that no corporation organized outside the state shall be allowed to transact business therein on more favorable conditions than are prescribed for domestic corporations, a British corporation, which transacted business in the state and maintained an office with managers empowered to transfer stock and issue shares, and which there sold and issued stock to a citizen of the state, was governed as to the transfer of such shares by the laws of California, and on the death of the stockholder his executrix, appointed in the state, was entitled to have the stock transferred to her. *London, Paris & Am. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 668.

REGISTRATION OF TRANSFER.

161. It is generally provided by charter or statutory provisions, or by authorized by-laws, that shares shall be transferable only on the books of the corporation. In the absence of such a requirement no record is necessary. As to the effect of such a requirement, the authorities do not agree. The result of the cases may be thus stated:

(a) In some states it is held that until a transfer is registered, or deposited for registration, the legal title to the shares remains in the transferor, and the transferee has only an equitable title. Under this view, until registration,

(1) The transferor remains the owner of the shares, as far as the acts and dealings of the corporation are concerned, unless it has notice of the transfer, in which case it must regard the equitable title of the transferee. In the absence of notice, it may hold the transferor liable as a stockholder, and may pay him dividends, and accord him other rights as the owner of the shares.

(2) The corporation may, as far as it is concerned, waive registration.

(3) Registration is not necessary to entitle a bona fide purchaser of shares from the holder of the legal title to prevail against equities of third persons.

(4) Nor is it necessary to entitle an innocent purchaser from the apparent and registered owner, under an unauthorized assignment, to prevail against the true owner on the ground of estoppel.

(5) Registration is necessary to relieve the transferor from the statutory liability to creditors of the corporation.

(6) It is also necessary as against bona fide purchasers or pledgees from the transferor.

(7) In some states, but not in all, attaching or execution creditors of the transferor after the transfer, but before registration, will prevail as against the transferee's equitable title, if they have levied in ignorance of the transfer; but, by the weight of authority, not if they had notice of it.

(8) In some jurisdictions it is held that failure to register a transfer, or deposit it for registration, is prima facie evidence of a secret trust, and, if unexplained, evidence of an intent to hinder and defraud creditors, so that, as to them, the transfer is void. Perhaps in some states it would be held that failure to deposit a transfer for registration is conclusive evidence of a secret trust.

(b) In some states it is held that the requirement of registration is intended solely for the benefit and protection of the corporation, and may be waived by it, and that it does not prevent an unregistered transfer from conveying, as against the transferor and all third persons, the whole title, legal as well as equitable.

162. Where a transfer is duly registered, issuance of a new certificate is not necessary to transfer the legal title.

No record is necessary to perfect the transfer of stock, unless it is required by statute, or by the charter or by-laws of the corporation.⁴¹ Almost all charters or acts of incorporation contain the provision that the stock shall be transferable on the books of the corporation in such manner as may be prescribed by the by-laws or articles of association. Often it is provided that they shall be transferable "only" on the books of the corporation. There is no difference in the meaning of these provisions.⁴² The cases are very far from being clear or in accord as to the effect of such a provision. On some points there is a direct conflict.

In some states the provision has been construed literally, and as excluding any other mode of transferring the legal title; and it is held in these states that until a transfer is registered, or at least deposited with the corporation for the purpose of registration, the legal title to the shares remains in the transferror, and the transferee has only an equitable title.⁴³

In other states it is held that such a provision is intended solely for the protection of the corporation, and can be waived or asserted at its pleasure. No effect is given to it except for the protection of the corporation, and it does not prevent a stockholder from parting with his interest by a mere assignment of his certificate, subject only to such liens as the corporation may have upon it,⁴⁴ and excepting the right of voting at stockholders' meetings, receiving dividends, etc. And it is held that, as between the parties themselves to a sale or pledge of shares, a delivery of the stock certificate, with an assignment and power of attorney to transfer the shares on the books of the corporation, passes the entire title, legal as well as equitable, in the shares, whether the transfer is registered or not.⁴⁵

⁴¹ *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

⁴² See *Williams v. Bank*, 5 Blatchf. (U. S.) 59, Fed. Cas. No. 17,727.

⁴³ *Fisher v. Bank*, 5 Gray (Mass.) 373, 1 Cumming, Cas. Priv. Corp. 664; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161 (explaining the earlier Connecticut cases); *Reed v. Copeland*, 50 Conn. 488, 47 Am. Rep. 663; *Brown v. Adams*, 5 Biss. (U. S.) 181, Fed. Cas. No. 1,986; *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690, 1 Cumming, Cas. Priv. Corp. 671; *Scott v. Bank* (C. C.) 15 Fed. 494, 1 Cumming, Cas. Priv. Corp. 687; *Johnson v. Lafin*, 5 Dill. (U. S.) 65, Fed. Cas. No. 7,393, 1 Cumming, Cas. Priv. Corp. 608, affirmed 103 U. S. 800, 26 L. Ed. 532; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390, 4 L. Ed. 269; *Sabin v. Bank*, 21 Vt. 362; *People's Bank v. Gridley*, 91 Ill. 457; *Becher v. Mill Co.* (C. C.) 1 Fed. 276; *Kerr v. Urle*, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493; *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905. And it has even been held that delivery of a certificate, properly indorsed, to the officers of the corporation, with a request to transfer the same, is not sufficient to pass the legal title. *Brown v. Adams*, *supra*.

⁴⁴ *Ante*, p. 401.

⁴⁵ *McNeill v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, 1 Cumming, Cas. Priv.

By the weight of authority, unless authorized to do so by its charter or by some statute, a corporation could not pass by-laws restricting the power to transfer the title to stock to transfers on the books of the corporation.⁴⁶

Necessity as against the Corporation.

Even in those jurisdictions where an unregistered transfer is regarded as passing the legal title as between the parties, and, a fortiori, in those jurisdictions where it is held that the equitable title only passes, a transfer, until registered or deposited for registration, confers on the transferee, as between himself and the company, no right beyond that of having the transfer properly entered. Until that is done, the person in whose name the stock is registered is, as between himself and the company, the owner to all intents and purposes.⁴⁷ A transferee, for instance, until he has had his transfer registered, or deposited it for registration, has no right to vote at stockholders' meetings.⁴⁸ He also takes the risk, as against the corporation, of payment of the dividends to the person who appears as owner on the books of the corporation.⁴⁹ But, of course, he would be entitled to recover them from the person so receiving them in an action for money had and received to his use. Assets of a corporation, on dissolution, may, like dividends, be safely distributed to those who appear on its books as owners of stock, and the distribution will be valid as against persons claiming under an unregistered transfer, of which the corporation had no notice.⁵⁰ The unregistered transferee also takes the risk of any lien which the corporation may acquire on the shares for indebtedness of the registered holder.⁵¹ The transferror is not relieved from liability for calls, nor does the transferee become liable for calls,

Corp. 620, W. D. Smith, Cas. Corp. 71; *Isham v. Buckingham*, 49 N. Y. 216; *Duke v. Navigation Co.*, 10 Ala. 82, 44 Am. Dec. 472; *Mandlebaum v. Mining Co.*, 4 Mich. 465, 2 Cumming, Cas. Priv. Corp. 159; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261. And see *Blouin v. Hart*, 30 La. Ann. 714; *Lund v. Wheaton Roller Mill Co.*, 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623; *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526; *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175; *Oulp v. Mulvane*, 66 Kan. 143, 71 Pac. 273. And see *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429.

⁴⁶ *Sargent v. Railway Co.*, 9 Pick. (Mass.) 202; *Driscoll v. Manufacturing Co.*, 59 N. Y. 96.

⁴⁷ *People v. Robinson*, 64 Cal. 373, 1 Pac. 156.

⁴⁸ *People v. Robinson*, *supra*.

⁴⁹ *Ante*, p. 337.

⁵⁰ *Bank of Commerce's Appeal*, 73 Pa. 59.

⁵¹ *Union Bank v. Laird*, 2 Wheat. (U. S.) 390, 4 L. Ed. 269. See *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 501.

until the transfer is registered, when registration on the books is required.⁵²

In those jurisdictions where it is held that the provision is for the protection of the corporation, it may be waived by the corporation. Therefore, though a transferror may be held liable for calls made subsequently to the transfer, but before registration, he cannot be held liable where the corporation waives the requirement of registration expressly or by its mode of doing business, as by failing to keep a registry book.⁵³

If a transfer is valid, the corporation is bound to register it. Any valid transfer in writing is valid as against the company, if, on being notified, it refuses to allow registration. A transferror, therefore, is not liable to the corporation for assessments authorized to be made on "stockholders" beyond their shares, after a valid assignment has been made, and the corporation has refused to register it.⁵⁴

Necessity as against Estoppel of Owner in Case of Unauthorized Transfer.

As we shall presently see, if the true owner of stock holds out another, or allows him to appear as having full power to dispose of the stock, and innocent third persons are thus led into dealing with the apparent owner, and taking a transfer from him, they will be protected, under the doctrine of equitable estoppel, against any claim by the true owner.⁵⁵ In such a case it is not necessary, as against the true owner that their transfer shall have been registered.⁵⁶

Necessity as against Prior Equities of Third Persons.

The fact that a transfer by one who has the legal title to shares, and the apparent absolute power to dispose of the same, is not registered, does not affect the right of the transferee to prevail against prior equities of third persons. Thus a bona fide purchaser of certificates of stock, upon which a power of attorney, authorizing their transfer to any person, is indorsed by the person in whose name the certificates were issued, and who was the last registered holder of the shares, takes them relieved of a secret trust existing back of the registry, though his transfer is not registered.⁵⁷

⁵² Marlborough Manuf'g Co. v. Smith, 2 Conn. 579, 583; Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905.

⁵³ Isham v. Buckingham, 49 N. Y. 216. And see American Nat. Bank v. Oriental Mills, 17 R. I. 551, 23 Atl. 795; Chemical Nat. Bank v. Colwell, 132 N. Y. 250, 80 N. E. 644.

⁵⁴ Chouteau Spring Co. v. Harris, 20 Mo. 383. Cf. Russell v. Easterbrook, *supra*.

⁵⁵ Post, p. 418.

⁵⁶ Otis v. Gardner, 105 Ill. 436; and other cases cited post, p. 418.

⁵⁷ Winter v. Montgomery Gaslight Co., 89 Ala. 544, 7 South. 773, 2 Cumming, Cas. Priv. Corp. 163.

Necessity as against Creditors of Corporation.

It is very generally held, even in those states where an unregistered transfer conveys the legal as well as the equitable title, that the statutory requirement of registration is intended for the protection of the creditors of the corporation, as well as of the corporation. And it is therefore held that a stockholder who has transferred his shares is not relieved from liability to creditors of the corporation until the transfer is registered. This question will be considered in a subsequent chapter.⁵⁸

Necessity as against Bona Fide Purchasers and Pledges.

In those jurisdictions where it is held that an unregistered transfer does not convey the legal title, it is clear that an unregistered transferee cannot set up the transfer as against a bona fide purchaser or pledgee from the person who appears as owner on the books of the corporation. And even in those jurisdictions where it is held that an unregistered transfer passes the legal as well as the equitable title, as between the parties, the transferee will lose the shares by a fraudulent transfer on the books by the registered owner to a bona fide purchaser, though he may hold a certificate.⁵⁹ But in such a case the unregistered transferee will have a right of action against the corporation for allowing a transfer on the books in violation of his rights.⁶⁰

An unregistered transfer is not good as against subsequent bona fide purchasers of the stock at a sale on execution against the transferrer, who appears on the books of the corporation as owner, where they have no notice of the transfer.⁶¹ It is otherwise if they have such notice.⁶²

By express provisions of the statute in some states, transfers of stock, if not registered within a certain time on the books of the corporation, are declared to be void as to bona fide creditors or purchasers without notice.

⁵⁸ *Shellington v. Howland*, 53 N. Y. 371; *Dane v. Young*, 61 Me. 160; *McClaren v. Franciscus*, 43 Mo. 452; *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690; post, p. 564. But in *Laing v. Burley*, 101 Ill. 591, it was held that, where a corporation issues a certificate to a transferee of shares in lieu of the certificate issued to the prior owner, the transferee becomes a stockholder, and liable as such to creditors of the corporation, though the corporation fails to register the transfer as required by its by-laws.

⁵⁹ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80, 80, 2 Cumming, Cas. Priv. Corp. 119, 137.

⁶⁰ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 80, 2 Cumming, Cas. Priv. Corp. 119, 137.

⁶¹ *Naglee v. Wharf Co.*, 20 Cal. 529.

⁶² *Newberry v. Manufacturing Co.*, 17 Mich. 141; *May v. Thoman*, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163; *George A. Barse L. S. C. Co. v. Range Valley Cattle Co.*, 16 Utah, 59, 50 Pac. 630.

Necessity as against Creditors of Registered Owner.

In some of those states where an unregistered transfer does not convey the legal title it is held that an attachment or execution by a creditor of the transferror and registered owner of shares will prevail against the transfer if it is not registered, or at least deposited for registration. These cases are based solely upon the ground that the legal title in such a case remains in the transferror, and is subject to attachment and execution for his debts, and does not rest on any idea of fraud, actual or constructive.⁶³ And it is further held that, as against the execution or attachment, it can make no difference that the corporation had notice of the transfer before the levy.⁶⁴ It has been held that, where registration is required, actual registration is necessary as against an execution or attaching creditor, and deposit for record is not sufficient.⁶⁵ But actual registration is not necessary if receipt for record be made sufficient to pass the title.⁶⁶

Even if an unregistered transfer be regarded as insufficient to pass the legal title, it passes an equitable title, and will be upheld as an equitable assignment. Therefore, by the weight of authority, an equitable assignment will prevail as against creditors of the transferror who attach the shares with full knowledge of the transfer.⁶⁷ It is

⁶³ *Fisher v. Bank*, 5 Gray (Mass.) 373, 1 Cumming, Cas. Priv. Corp. 664; *Williams v. Bank*, 5 Blatchf. (U. S.) 59, Fed. Cas. No. 17,727; *People's Bank of Bloomington v. Gridley*, 91 Ill. 457; *Northrop v. Turnpike Co.*, 3 Conn. 544; *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 552; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270, 32 N. W. 336, 60 Am. Rep. 689; *Isbell v. Graybill*, 19 Colo. App. 508, 76 Pac. 550. In Massachusetts, the rule has been changed by statute, which makes the delivery of a certificate to a bona fide purchaser or pledgee for value received, together with a written transfer or written power of attorney to transfer, signed by the person named as owner in the certificate, a sufficient delivery to transfer the title as against all persons. This statute authorizes the transfer of certificates by indorsement in blank and delivery, without inquiry as to the rights, if any, of third persons. *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201. Similar statutory changes have been made in many states where the rule formerly prevailed. See *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087; *Cook, Corp.* § 448. Compare *Sibley v. Bank*, 133 Mass. 515; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

⁶⁴ *Fisher v. Bank*, supra; *Ottumwa Screen Co. v. Stodghill*, 103 Iowa, 437, 72 N. W. 669.

⁶⁵ *Northrop v. Turnpike Co.*, supra; *Perkins v. Lyons* (Iowa) 82 N. W. 486. But see *Colt v. Ives*, 31 Conn. 65.

⁶⁶ *Oxford Turnpike Co. v. Bunnell*, supra.

⁶⁷ *Black v. Zacharie*, 3 How. (U. S.) 482, 11 L. Ed. 690, 1 Cumming, Cas. Priv. Corp. 671; *Scripture v. Soapstone Co.*, 50 N. H. 571, 1 Cumming, Cas. Priv. Corp. 677; *Buttrick v. Railroad Co.*, 62 N. H. 413, 13 Am. St. Rep. 578; *Weston v. Mining Co.*, 6 Cal. 425; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507; *Newberry v. Manufacturing Co.*, 17

otherwise if they have no notice of the transfer.⁶⁸ So the corporation itself, being a creditor of a stockholder, cannot, if it has notice of an equitable assignment of his shares, attach them before the transfer is registered, and so prevail as against the transferee, unless it is given a lien on shares for debts due from stockholders.⁶⁹

By the weight of authority, however, it is held that, when shares are sold or pledged, there is no necessity to have the transfer registered on the books of the corporation, in order to make it good as against subsequent attaching creditors of the transferor, unless such a step is expressly required as against creditors by the charter of the corporation, or by some statute; and that, in the absence of a charter or statutory provision clearly showing an intention on the part of the legislature to make a transfer void as against creditors unless registered, a transfer as at common law will be sufficient.⁷⁰ In these states, therefore, in the absence of such an express statutory provision, there must be some element of fraud or estoppel to defeat the rights of an unregistered transferee, and to give the claims of creditors of the transferor priority.

Of course, in those jurisdictions where it is held that an unregistered transfer conveys the legal as well as the equitable title, the transfer

Mich. 141; *George A. Barse L. S. Co. v. Range Val. Cattle Co.*, 16 Utah. 59, 50 Pac. 630. Contra, *Screen Co. v. Stodghill*, 103 Iowa, 437, 72 N. W. 669; *Perkins v. Lyons*, 111 Iowa, 192, 82 N. W. 486.

⁶⁸ *Weston v. Mining Co.*, 5 Cal. 186, 63 Am. Dec. 117; *State Ins. Co. v. Gennett*, supra; *State Ins. Co. v. Sax*, supra; *Buttrick v. Railroad Co.*, supra; *West Coast Safety-Faucet Co. v. Wolff*, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171; *Boone v. Van Gorder*, 164 Ind. 499, 74 N. E. 4, 108 Am. St. Rep. 314.

⁶⁹ *Scripture v. Soapstone Co.*, supra.

⁷⁰ *Broadway Bank v. McElrath*, 13 N. J. Eq. 24, 1 Cumming, Cas. Priv. Corp. 683; *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435, 1 Cumming, Cas. Priv. Corp. 650; *Scott v. Bank (C. C.)* 15 Fed. 494, 1 Cumming, Cas. Priv. Corp. 687; *Continental Nat. Bank v. Elliot Nat. Bank (C. C.)* 7 Fed. 369; *Lund v. Wheaton Roller M. Co.*, 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623; *May v. Thoman*, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163; *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, 35 C. C. A. 476; *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786; *Mapleton Bank v. Standrod*, 8 Idaho, 740, 71 Pac. 119, 67 L. R. A. 656; *Lipscomb's Adm'r v. Condon*, 58 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938. In *Broadway Bank v. McElrath*, supra, M. had delivered to the complainants certificates of stock in a corporation, accompanied by an assignment, and an irrevocable power of attorney for the transfer thereof, as security for certain debts. The charter of the corporation provided that its capital stock should be deemed personal property, and be transferable on the books of the corporation, and also that books of transfer of stock should be kept, and should be evidence of ownership of said stock in all elections and other matters submitted to the decision of the stockholders of the corporation. It was held that, notwithstanding such provisions, the transfer by M., though unregistered, was good as against an attachment subsequently levied by his creditor.

will prevail as against an attaching creditor of the transferror, even though he has no notice of the transfer, unless there is some element of fraud or estoppel.

Where stock is held in trust by the registered holder, and the whole beneficial interest is in another, the stock does not pass to the registered holder's assignee in bankruptcy or insolvency.⁷¹

In some states it is provided by statute that no transfer shall be valid as against creditors until the certificate shall have been filed for record in a public office.*

Same—Failure to Register as Evidence of Secret Trust.

Transfers of stock, if made with intent to hinder, delay, and defraud creditors, and not in good faith, are void as to creditors of the transferror to the same extent as a transfer of any other property with such intent would be. In some jurisdictions, retention of possession of property by the seller is evidence of a secret trust, and, if unexplained, the sale will be held fraudulent and void as to creditors of the seller. In other jurisdictions, retention of possession renders the sale, not merely prima facie fraudulent, but conclusively so. These doctrines as to the effect of retention of possession by the seller of property apply to sales of shares of stock. Unless there is such a change of possession as the nature of the property will permit, the sale, in some jurisdictions, will be conclusively fraudulent as to creditors; in others, prima facie so. The question therefore arises: What is a sufficient change of possession on a sale of shares? The supreme court of New Hampshire has held that, upon a sale or pledge of stock, there should be such a delivery as the nature of the thing allows; that, as against a subsequent attaching creditor, the transferee must be clothed with all the usual muniments and indicia of ownership; that the delivery will not be complete until an entry of the transfer is made upon the stock record, or notice is sent to the office of the corporation for that purpose; and that the omission to thus perfect the delivery will be prima facie, and, if unexplained, conclusive, evidence of a secret trust, and therefore, as a matter of law, fraudulent and void as to the transferror's creditors.⁷²

⁷¹ Sibley v. Bank, 133 Mass. 515.

* See Fahrney v. Kelly (C. C.) 102 Fed. 403; Masury v. Arkansas Nat. Bank (C. C.) 87 Fed. 381; Scott v. Houpt, 73 Ark. 78, 83 S. W. 1057; Hudson v. Bank of Pine Bluff, 75 Ark. 493, 84 S. W. 1177.

⁷² Pinkerton v. Railroad Co., 42 N. H. 424, 1 Cumming, Cas. Priv. 'Corp. 652. Where a transfer is made at a distance from the office of the corporation, and in another state, and the old certificates are surrendered, and new ones issued by the transfer agent of the corporation appointed for that purpose in such state, proof that the proper evidence of such transfer was sent to the keeper of the stock record, to be entered, by the earliest mail, although

If the failure to register a transfer of shares is explained, and the presumption of fraud rebutted, in those jurisdictions, at least, where it is rebuttable, the title of the transferee will prevail as against creditors of the transferor, even though they may attach the shares in ignorance of the transfer.⁷³ "The ground," said the Connecticut court, "on which stock sold, but not legally transferred (that is, on the books), is open to attachment by the creditors of the vendor, is the same upon which personal chattels sold but retained in the possession of the vendor are liable to attachment by the vendor's creditors. The principle in each case is, that the retention of possession is a badge of fraud; that is, is evidence of a fraudulent secret trust. * * * But it is well settled that this retention of possession in every case is only a badge; that is, is evidence of fraud, to be regarded as conclusive where the retention of possession is voluntary and unnecessary."⁷⁴

Issuance of New Certificate.

A transfer on the books of the corporation is sufficient to vest the title in the transferee without the issuance of a new certificate in the name of the transferee.⁷⁵ The certificate, as we have seen, is merely evidence of title to shares, and it not at all necessary to constitute one a stockholder.⁷⁶

not received until an attachment was levied, will be a sufficient explanation of the want of delivery, and the transfer will be good as against the attaching creditor. *Pinkerton v. Railroad Co.*, supra. But where a pledge of stock was made in Boston by a transfer of the certificates to the pledgee, and nothing more was done for nearly a month, and then the old certificates were surrendered, and new ones issued by the transfer agent there, and notice given by the first mail to the office of the corporation in New Hampshire, it was held that the transfer was not good as against an attachment levied on the shares in New Hampshire before the issuance of the new certificates, and the notice to the office. *Pinkerton v. Railroad Co.*, supra.

⁷³ *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161; *U. S. v. Vaughan*, 3 Bin. (Pa.) 394, 5 Am. Dec. 375. See *Hotchkiss & U. C. v. Union Nat. Bank*, 68 Fed. 76, 15 C. C. A. 264; *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273.

⁷⁴ *Colt v. Ives*, supra.

⁷⁵ *Chouteau Spring Co. v. Harris*, 20 Mo. 383. The seller fulfills his contract by causing the stock to be transferred on the books without delivery of the certificate. *White v. Salisbury*, 33 Mo. 150.

⁷⁶ Ante, p. 307.

FORGED AND UNAUTHORIZED TRANSFERS.

- 163.** Certificates of stock are not negotiable instruments, unless expressly made so by statute. Therefore a transferee under a forged assignment and power of attorney acquires no title as against the true owner. And the same is true of an unauthorized transfer by one who has stolen or found a certificate indorsed in blank by the true owner.
- 164.** A transfer of certificates of stock by one who holds the legal title in trust, but who appears as absolute owner on the books of the corporation, conveys a good title, as against the cestui que trust, if the transferee is an innocent purchaser for value and without actual or constructive notice of the trust, but not otherwise.
- 165.** If the owner of a certificate of stock allows another to appear as owner, with full power to dispose of it, and innocent third persons are thus led into dealing with the apparent owner, they will acquire title, as against him, by estoppel.
- 166.** The doctrine of *lis pendens*, as constructive notice, does not apply to transfers of stock.

Certificates of shares of stock in a corporation are not negotiable instruments, like bills and notes, unless, as is the case in some jurisdictions, they are expressly made so by statute. And no mere usage among stockbrokers or others can make them so, for no usage is good if it conflicts with an established principle of law.⁷⁷ Certificates of stock are on the same footing as other nonnegotiable choses in action, and they are subject, therefore, to the general rule that an assignor can transfer no better title than he has himself.⁷⁸ It follows from this principle that, in the absence of negligence on the part of the owner of stock sufficient to operate as an estoppel against him, a transfer by a person who has no title to shares, and no authority from the owner to transfer the same, gives the transferee no title, as against the owner, though he may have purchased them in good faith for value, and without notice of the want of title or authority in the transferrer.

⁷⁷ *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73, 1 Cumming, Cas. Priv. Corp. 647, W. D. Smith, Cas. Corp. 76; *Geyser-Marion Gold Min. Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684. Cf. *Russell v. American Bell Tel. Co.*, 180 Mass. 467, 62 N. E. 751; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

⁷⁸ *East Birmingham Land Co. v. Dennis*, *supra*. And see *Sewall v. Power Co.*, 4 Allen (Mass.) 277, 282, 81 Am. Dec. 701; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Pollock v. Bank*, 7 N. Y. 274, 57 Am. Dec. 520; *President, Directors & Co. of Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599; *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; *Hall v. Road Co.*, 70 Ill. 673; *Western Union Tel. Co. v. Davenport*, 97 U. S. 369, 1 Cumming, Cas. Priv. Corp. 643.

It is accordingly well settled that, in the absence of negligence, a forged indorsement and transfer of certificates of stock cannot divest the owner of his title, nor confer any rights, as against him, upon the transferee; and if the corporation recognizes the forged indorsement, and transfers the stock, so that the certificate is lost to the real owner, it may be compelled to replace it, or to pay him its value.⁷⁹ On the same principle, an innocent purchaser of a certificate of stock indorsed in blank by the owner, and stolen from him, or lost by him, without negligence on his part, acquires no title, as against the owner.⁸⁰ "Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires, in the cases mentioned, that the property wrongfully transferred or stolen should be restored to its rightful owner."⁸¹

One who is entitled to stock, certificates for which have been wrongfully transferred to another, may maintain a bill in equity to have the wrongful certificates canceled, and certificates issued to himself, if the loss of the stock cannot be adequately compensated in a common-law action.⁸²

⁷⁹ *Western Union Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047, 1 Cumming, Cas. Priv. Corp. 643; *Hildyard v. South-Sea Co.*, 2 P. Wms. 76; *Sewall v. Power Co.*, 4 Allen (Mass.) 277, 81 Am. Dec. 701; *Pratt v. Manufacturing Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Pollock v. Bank*, 7 N. Y. 274, 57 Am. Dec. 520; *Machinists' Nat. Bank v. Field*, 126 Mass. 345, 2 Cumming, Cas. Priv. Corp. 175; *Pennsylvania Co. v. Franklin Fire Ins. Co.*, 181 Pa. 40, 37 Atl. 191, 37 L. R. A. 780; *Chicago Edison Co. v. Fay*, 164 Ill. 323, 45 N. E. 534; *Geyser-Marion Gold Min. Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684. And see *Taft v. Railroad Co.*, 84 Cal. 131, 24 Pac. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166.

⁸⁰ *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73, 1 Cumming, Cas. Priv. Corp. 647, W. D. Smith Cas. Corp. 76; *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; *Sherwood v. Mining Co.*, 50 Cal. 412; *O'Herron v. Gray*, 168 Mass. 573, 47 N. E. 428, 40 L. R. A. 498, 60 Am. St. Rep. 411; *Farmers' Bank v. Diebold Safe & L. Co.*, 66 Ohio St. 367, 64 N. E. 518, 58 L. R. A. 620, 90 Am. St. Rep. 586.

⁸¹ *Western Union Tel. Co. v. Davenport*, *supra*.

⁸² *Walker v. Railway Co.*, 47 Mich. 338, 11 N. W. 187. Where plaintiff held bank stock as security, and the bank illegally levied an assessment thereon, and sold it for delinquency at public auction, plaintiff could obtain relief in equity to compel the bank to recognize it as a stockholder. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. See post, p. 421.

Liability of Transferee.

A corporation may maintain an action for damages against a person who presents a forged or unauthorized power of attorney to transfer stock, upon the faith of which the corporation transfers the stock and suffers loss, though such person acted in good faith.⁸³

Transfers by Trustees.

Where the person who appears on the books of the corporation as the absolute owner of stock holds the stock in trust, a purchaser and transferee from him, if he has actual or constructive notice of the trust, takes subject to the equitable rights of the cestui que trust.* And, if the certificate shows on its face that it is held in trust, transferees are charged with notice of the trust, and with the duty of inquiring into the authority of the holder to transfer the same.⁸⁴ The rule is different where the transferee of a certificate has no notice that it is held in trust, and there is nothing to put him on inquiry. It is a general rule that when the legal title to property, and the apparent unlimited power of disposition, are vested in a person, the rights of a purchaser from him for a valuable consideration, without notice of a secret trust upon which the property, is held, are unaffected. The purchaser in such a case acquires an equity equal to the outstanding equity of which he has no notice, and this, coupled with the legal title, prevails against the prior equity. This principle is applicable to transfers of certificates of stock. If a person who holds the legal title to certificates in trust appears on the books of the corporation as the absolute owner, a purchaser and transferee of the certificates for value, and without actual or constructive notice of the trust, acquires a good title, as against the cestui que trust. And this is true whether his transfer has been registered on the books of the corporation or not.⁸⁵ This applies

⁸³ *Boston & A. R. Co. v. Richardson*, 135 Mass. 473.

* *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139; *Westinghouse v. German Nat. Bank*, 188 Pa. 630, 41 Atl. 734; *Davis v. National Eagle Bank (R. I.)* 50 Atl. 530. One who accepts and pays for certificates of stock indorsed by a blank power of attorney, signed by the party to whom they were issued, is not a bona fide purchaser, if he had knowledge that the shares were in pledge and that the party from whom he received them was neither the pledgee nor the pledgor, nor entitled to act for either. *New Jersey Trust & Safe Deposit Co. v. Bodine (N. J. Ch.)* 60 Atl. 387.

⁸⁴ *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. But see *Albert v. Bank*, 1 Md. Ch. 407; *O'Herron v. Gray*, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411; *Geyser-Marion Gold Min. Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; *Johnson v. Amberson*, 140 Ala. 342, 37 South. 273.

⁸⁵ *Winter v. Gaslight Co.*, 89 Ala. 544, 7 South. 773, 2 Cumming, Cas. Priv. Corp. 163. And see *Weyer v. Bank*, 57 Ind. 198; *Albert v. Bank*, 1 Md. Ch.

to transfers by executors. In the case of executors, however, purchasers of stock from them, knowing their character, are chargeable with notice of the contents of the will.⁸⁶ At common law, executors have the same power over the disposition of the testator's personal property as the testator himself would have, except in so far as there may be restrictions in the will; and, where such is the case, he has power to sell stock belonging to the estate, and innocent purchasers will acquire title, though he may be selling the same to convert it to his own use.⁸⁷ If his powers are restricted by statute, as is now generally the case, a sale of stock must be made in compliance with the statute, or no title will pass. Thus, if an executor sells stock belonging to the estate at a private sale, without an application to the court, when a statute authorizes a sale at public auction only, unless an order of court is obtained authorizing a private sale, the sale passes no title to the stock, though the transfer is entered on the books of the corporation.⁸⁸

Estoppel of True Owner in Case of Unauthorized Transfer.

Certificates of stock and unauthorized transfers are subject to the doctrine of equitable estoppel. According to this doctrine, if the true owner of certificates of stock holds out another, or allows him to appear, as having full power of disposition thereof, and innocent third persons are thus led into dealing with the apparent owner, they will be protected, as against any claim by the true owner.⁸⁹ Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are based upon the conduct of the real owner, which precludes him from disputing, as against them,

407; *Lowry v. Bank, Taney* (U. S.) 810, Fed. Cas. No. 8,581. Where, for the purpose of qualifying a person to be a director, a corporation issued to him a certificate of stock, he agreeing to reassign it when he ceased to be a director, the trust being secret, and he agreed to assign it to another as collateral on the latter becoming surety on a note, and the latter did so on this promise and without notice of the trust, as between the company and the surety the equity of the latter was superior. *Dueber Watch-Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 445.

⁸⁶ See *Lowry v. Bank, Taney* (U. S.) 310, Fed. Cas. No. 8,581.

⁸⁷ *Lowry v. Bank*, supra; *Weyer v. Bank*, 57 Ind. 198.

⁸⁸ *Weyer v. Bank*, supra.

⁸⁹ *McNeill v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, 1 Cumming, Cas. Priv. Corp. 620, W. D. Smith, Cas. Corp. 71; *Cherry v. Frost*, 7 Lea (Tenn.) 1; *Jarvis v. Rogers*, 13 Mass. 105; *Colonial Bank v. Cady*, 15 App. Cas. 267, 1 Cumming, Cas. Priv. Corp. 629; *Otis v. Gardner*, 105 Ill. 436; *Mt. Holly Lumberton & Medford Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 N. J. Eq. 479; *Walker v. Railway Co.*, 47 Mich. 338, 11 N. W. 187; *Brittan v. Oakland Bank*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Westinghouse v. German Nat. Bank*, 196 Pa. 249, 46 Atl. 380; *Russell v. American Bell Tel. Co.*, 180 Mass. 467, 62 N. E. 751; *Shattuck v. American Cement Co.*, 205 Pa. 197, 54 Atl. 785, 97 Am. St. Rep. 735.

the existence of the title or authority which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the transfer.⁹⁰ In *McNeil v. Tenth Nat. Bank*,⁹¹ the owner of shares in a corporation delivered to his brokers, to secure a balance of account, the certificates of the shares, indorsed with a blank assignment and irrevocable power to transfer the same on the books of the corporation, signed and sealed by himself, and expressed to be "for value received"; and the brokers, without his knowledge or consent, pledged the shares, for their own indebtedness, to one who had no actual knowledge of the title under which they held. It was held that the pledgee of the brokers acquired a good title to the shares, as against the owner, who was estopped to deny the apparent title of the brokers under his indorsement and irrevocable power of attorney.

This doctrine applies only on the ground that the owner of the stock allows the holder of the certificate to appear as owner. It does not apply, therefore, where the holder of the certificate, in transferring it without authority, does not pretend to own the stock and to act for himself, but claims to act for the owner, and under authority from him. In such a case the owner would not be estopped unless he held the transferrer out as having the particular authority claimed. In *Merchants' Bank of Canada v. Livingston*,⁹² a pledgee of a certificate of stock which was indorsed by the owner in blank, with an irrevocable power of attorney to transfer the same on the books of the corporation, applied to the plaintiff for a loan, offering the stock as security. He did not claim to own the stock, nor ask the loan on his own account, but stated that he wanted it for his client. The plaintiff, in good faith, made the loan, and took the certificate as security, and contended that the owner was estopped, under the doctrine of *McNeil v. Tenth Nat. Bank*. It was held that there was no estoppel, as the owner had not held the pledgee out as having authority to borrow money for him and pledge the stock as security, though he would have been estopped if the pledgee had sold or pledged the stock as his own, as he was clothed with apparent ownership.

Simply intrusting the possession of a certificate of stock to another as depositary, pledgee, or other bailee, or even under a conditional, executory contract of sale, will not preclude the owner from asserting his title in case of an unauthorized disposition of it by the person so intrusted; for the mere possession of chattels, by whatever means acquired, if there is no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.⁹³

⁹⁰ *McNeil v. Bank*, *supra*.

⁹¹ *Supra*.

⁹² 74 N. Y. 223; 2 Cumming, *Can. Priv. Corp.* 142.

⁹³ *McNeil v. Bank*, *supra*.

If an indorsement of assignment and power of attorney on a certificate of stock is sufficient to put persons dealing with the holder upon inquiry as to his title, or if it may mean on its face either an absolute transfer, or a transfer for a particular purpose only, persons who take the stock from the holder are chargeable with notice of his title, and the owner will not be estopped, as against them, to deny that the transfer was absolute. This principle was applied in *Colonial Bank v. Cady*,⁹⁴ where the executors of the former owner of shares indorsed the certificates with an assignment and power of attorney in blank, and sent them to a broker for the purpose of having them registered in their names as executors. The broker fraudulently deposited the certificates with a bank as security for advances. It was held that the bank acquired no title to the stock, as against the executors, though it took the certificates in perfect good faith, and without actual notice of the character in which the broker held them, and for these two reasons: In the first place, certificates so indorsed by executors were not treated on the stock exchange as being in order, or received as sufficient security for advances, unless duly authenticated, and this was sufficient to put the bank upon inquiry. In the second place, the conduct of the executors in delivering the transfers indorsed by them as executors was consistent either with an intention to sell or pledge the shares, or with an intention merely to have themselves registered as the owners, and therefore they were not estopped to assert that they did not intend an absolute transfer.

Effect of Judicial Proceedings.

The question how far a purchaser of stock, where a certificate therefor is outstanding, is affected by previous or pending judicial proceedings concerning the ownership of the stock, is not altogether clear. It has been held in New York that the doctrine of *lis pendens* does not apply to a sale of shares of stock, and, therefore, that the pendency of an action concerning the title to shares, the certificate of which is outstanding, is not constructive notice to one who purchases the certificate, and that a judgment rendered after the transfer does not defeat his title.⁹⁵ It was held by Judge Woodruff, in the circuit court of the United States for the Southern district of New York, that a decree of a court having jurisdiction of the subject-matter and of the parties, vesting the title to stock in a person other than the holder of the

⁹⁴ 15 App. Cas. 287, 1 Cumming, Cas. Priv. Corp. 629.

⁹⁵ *Holbrook v. Zinc Co.*, 57 N. Y. 816, 2 Cumming, Cas. Priv. Corp. 152. Compare *Leitch v. Wells*, 48 N. Y. 585. See, also, *Davis v. Miller Signal Co.*, 105 Ill. App. 657. The pendency of an action in another state concerning the title to stock would not be notice to a purchaser of the outstanding certificate, even if the doctrine of *lis pendens* were applicable to a sale of shares. *Holbrook v. Zinc Co.*, *supra*.

outstanding certificate, and a transfer made by a master in pursuance thereof, and made known to the corporation, is a complete protection to the corporation against purchasers of the outstanding certificate, though they pay value and have no notice of the decree.⁹⁶ Such a decree and transfer could not affect the title of one who purchased the outstanding certificate before commencement of the action, nor, if the New York cases are sound, after the commencement of the action, but before the decree.⁹⁷ And the later cases tend to hold that a purchaser of outstanding certificates, without notice, even after a decree in a suit to which he was not a party, declaring them void and canceling them, would not be affected by the decree, but could hold the corporation liable.⁹⁸

LIABILITY OF INDORSER OF FORGED CERTIFICATE.

167. Though there is authority to the contrary, by the better opinion one who indorses a certificate of stock in blank thereby warrants its genuineness, and will be liable to subsequent bona fide purchasers.

It has been held that the signing of a transfer in blank on a certificate of stock is a warranty of the genuineness of the certificate, and that a transferrer, therefore, who indorses a forged certificate in blank, though he may have taken the same in good faith, and may be ignorant of the forgery, is liable to subsequent bona fide purchasers. In *Matthews v. Massachusetts Nat. Bank*,⁹⁹ a stock certificate originally for 2 shares of stock in the name of one Coe, which had been fraudulently altered so as to purport to be for 200 shares in the name of the defendant as collateral, was received in good faith by the defendant from Coe as collateral security for a loan from him. On payment of the loan by Coe the defendant signed a transfer in blank upon the back of the certificate, and delivered it to Coe. Afterwards the plaintiff, in good faith, received the same certificate from Coe as collateral security for

⁹⁶ *Sprague v. Manufacturing Co.*, 10 Blatchf. (U. S.) 173, Fed. Cas. No. 18,249, 1 Cumming, Cas. Priv. Corp. 661. A suit to adjust equitable interests in the stock of a domestic corporation, and to compel registry on the company's books of the legal title in the owner as determined by the court, is in the nature of a proceeding in rem, so that the decree will bind the interests of nonresident defendants who are given statutory notice. *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853. See, also, *Andrews v. Quayguil & Q. Ry. Co.* (N. J. Ch.) 60 Atl. 568.

⁹⁷ *Holbrook v. Zinc Co.*, supra; *Joslyn v. Distilling Co.*, 44 Minn. 183, 46 N. W. 337, 2 Cumming, Cas. Priv. Corp. 177; *Bean v. Trust Co.*, 122 N. Y. 622, 28 N. E. 11, 2 Cumming, Cas. Priv. Corp. 179.

⁹⁸ Cases cited in the preceding note. See post, p. 428.

⁹⁹ *Holmes* (U. S.) 396, Fed. Cas. No. 9,286.

a loan then made to him. The plaintiff's debt was not paid by Coe, and, the certificate proving worthless, the plaintiff sued the defendant for damages, on the ground that the defendant, by its indorsement, warranted the certificate to be genuine. It was held that he could recover.

LIABILITY OF CORPORATION ARISING FROM UNAUTHORIZED OR INVALID TRANSFER.

168. A corporation is liable to the owner of stock if it registers a forged or unauthorized or invalid transfer, unless the owner is estopped by negligence.

169. If the holder of the legal title to a certificate of stock appears to be the absolute owner, and the corporation has no notice that the fact is otherwise, it will incur no liability to the equitable owner by recognizing a transfer from the holder.

As we have just seen, in the absence of elements of estoppel a forged or unauthorized indorsement or transfer of certificates of stock cannot divest the owner of his title, nor confer any rights, as against him, upon the transferee. If, therefore, a corporation recognizes a forged or unauthorized indorsement and transfer, and transfers the stock and issues a new certificate, so that the certificate is lost to the real owner, it may be compelled to replace it, or pay him its value. And it can make no difference whatever that the corporation has not been guilty of fraud or negligence.¹⁰⁰ No liability, however, will attach to the corporation where the owner of the stock has been negligent. In such a case he will be estopped to deny the title of the transferee, and this estoppel will inure to the benefit of the corporation.¹⁰¹

Not only does a corporation, in permitting a transfer of stock to be made under a power of attorney, take the risk of the power of attorney being genuine and not a forgery, and of its being authorized, but it also takes the risk of its validity in other respects; and it will be liable if it was void because executed by a married woman, or if it was executed by an infant or insane person, and has been avoided.* And it

¹⁰⁰ *Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047, 1 Cumming. Cas. Priv. Corp. 643; *Taft v. Railroad Co.*, 84 Cal. 131, 24 Pac. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166; *Geyser-Marion Gold Min. Co. v. Stark*, 106 Fed. 558, 45 O. C. A. 467, 53 L. R. A. 684. See ante, p. 415, where the cases are collected.

¹⁰¹ Ante, p. 418.

* Though a corporation may, at the instance of a married woman, transfer to her husband shares of its stock which had been issued to her, but which she had, without an order of court, sold to him, it cannot be accountable to her therefor, unless, when it made the transfer, or before the stock got

makes no difference that the corporation was not guilty of actual fault.¹⁰² The corporation has ample means to protect itself, for it may refuse to recognize a power of attorney until satisfied of its genuineness and validity, and may require the personal attendance of the party for the purpose of determining such questions of fact as may give rise to disputes.¹⁰³

If the holder of a certificate of stock appears to be the absolute owner, and the corporation has no notice that the fact is otherwise, it may safely issue a new certificate to his transferee, which, if taken in good faith and for value, will vest a perfect title in him; and in such a case no liability attaches to the corporation, in favor of an equitable owner of the shares, for permitting the transfer and issuing the new certificate.¹⁰⁴ But, for the protection of the equitable owner of shares, the corporation is bound to use reasonable care in recognizing transfers and issuing new certificates; and if, by the form of the certificate or otherwise, the corporation has notice that the transferrer is not the absolute owner, but holds the shares by such a title that he may not have authority to transfer them, the corporation is not obliged, without evidence of such authority, to issue a certificate to his assignee; and if, without making any inquiry, it does issue a new certificate, and the equitable owner is injured thereby, he may hold the corporation liable, and this without proof of fraud or collusion. All the authorities agree that the corporation is liable where it has notice that the transferrer holds the stock in trust, and issues a new certificate without inquiry as to whether the transfer is authorized.¹⁰⁵

In case of transfers by an executor, the corporation is chargeable with notice of the will and its contents. But, since an executor has authority to sell stock to pay debts of the testator, the corporation does not render itself liable by registering a transfer by him, if it has no reasonable ground for supposing that he is misapplying the assets, though the stock may be specifically bequeathed.¹⁰⁶ If, however, it

into the hands of an innocent purchaser, it had notice of the relation existing between her and the person to whom she directed the transfer to be made, and the resulting incapacity on her part to make such sale to her husband. *Bigby v. Atlanta & W. P. R. Co.*, 119 Ga. 685, 46 S. E. 827.

¹⁰² *Chew v. Bank*, 14 Md. 299.

¹⁰³ *Chew v. Bank*, *supra*.

¹⁰⁴ *Loring v. Salisbury Mills*, 125 Mass. 150; *Hughes v. Drivers' & M. Nat. Bank*, 86 Md. 418, 38 Atl. 936.

¹⁰⁵ *Loring v. Salisbury Mills*, *supra*; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Cooper v. Illinois Cent. R. Co.*, 38 App. Div. 22, 57 N. Y. Supp. 925; *Wooten v. Wilmington & W. R. Co.*, 128 N. C. 119, 38 S. E. 298; *Spellissy v. Cook & B. Co.*, 58 App. Div. 283, 68 N. Y. Supp. 995.

¹⁰⁶ *Lowry v. Bank, Taney (U. S.)* 310, Fed. Cas. No. 8,581.

has reasonable grounds for supposing the executor is misapplying the assets, and permits a transfer, it will be liable.¹⁰⁷

**LIABILITY OF CORPORATION ON CERTIFICATES ISSUED
FRAUDULENTLY, WITHOUT AUTHORITY, ETC.**

170. If the officers of a corporation, having apparent authority to issue certificates, issue certificates fraudulently, or without actual authority, or by mistake, to persons not entitled thereto it will be liable to bona fide purchasers and transferees thereof.

171. If a corporation registers a transfer and issues a new certificate without surrender of the outstanding certificate, it will be liable on both certificates to bona fide purchasers and transferees thereof.

A corporation, by issuing a certificate of stock affirming that the person designated therein is the owner of a certain number of shares, transferable in the manner indicated thereon, becomes estopped, as against bona fide purchasers of the certificate, to say that it was issued without authority, or to a person not entitled. Therefore, if a corporation recognizes a forged or unauthorized transfer, and registers the same in the name of the transferee, and issues a new certificate to him, it will be liable to bona fide purchasers from the transferee, unless there is some element of estoppel, as against the real owner, which will prevent him from denying the transferee's title. It is not necessary that the corporation shall have been guilty of fraud or negligence. By thus holding the transferee out as the owner of stock, it is estopped to deny his title, as against bona fide purchasers.¹⁰⁸

Such a transfer cannot affect the title of the real owner, where there is no element of estoppel against him, and therefore it cannot substitute the purchaser as a stockholder in his stead.¹⁰⁹ If the corporation had power to issue new shares, the certificate issued to the transferee will be valid, and will make the holder a stockholder. If it had already issued the full amount of stock authorized by its charter, the certificate

¹⁰⁷ *Lowry v. Bank*, supra. And see *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

¹⁰⁸ *Mandlebaum v. Mining Co.*, 4 Mich. 465, 2 Cumming, Cas. Priv. Corp. 159; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 2 Cumming, Cas. Priv. Corp. 119; *Simm v. Telegraph Co.*, 5 Q. B. Div. 188, 2 Cumming, Cas. Priv. Corp. 165; *Machinists' Nat. Bank v. Field*, 126 Mass. 345, 2 Cumming, Cas. Priv. Corp. 175; *In re Bahia & S. F. R. Co.*, L. R. 3 Q. B. 584; *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777. And see *Philadelphia Nat. Bank v. Smith*, 195 Pa. 38, 45 Atl. 655.

¹⁰⁹ See dictum in *Moore v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 335, 2 Cumming, Cas. Priv. Corp. 144.

cannot confer rights of membership, for an increase of stock would be ultra vires and void; and the remedy of a purchaser is by action against the corporation for damages, in which he may recover the value of the stock.¹¹⁰

It has been held that by registering a forged or unauthorized transfer, and issuing a new certificate to the transferee, the corporation is estopped to deny the validity of the transfer, even as against the transferee himself;¹¹¹ but by the better opinion the estoppel does not operate in favor of the transferee, for he has not taken the certificate on the faith of the corporation's conduct in issuing it and recognizing the transfer as valid, but on the faith of the forged or unauthorized assignment and power of attorney.¹¹² And the corporation in such a case may maintain an action against him for the damages it may have sustained.¹¹³ Nor does a corporation, by registering a forged or unauthorized transfer and issuing a new certificate, become liable to one who takes the certificate with notice of the forgery or want of authority, or of facts sufficient to put him upon inquiry.¹¹⁴

If an officer of a corporation, whose duty or apparent duty it is to issue certificates of stock, issues spurious certificates to himself or to another, the corporation will be liable to bona fide purchasers or pledgees of the certificates for the damages sustained by them.¹¹⁵ There will be no liability, however, to persons who take the certificates with notice of their invalidity, or with knowledge of facts sufficient to put them on inquiry.¹¹⁶ If the corporation had authority under its charter

¹¹⁰ See the cases cited in note 108, *supra*.

¹¹¹ *Ashby v. Blackwell*, 2 Eden, 299; decision of Lindley, J., in *Simm v. Telegraph Co.*, 5 Q. B. Div. 188, 2 Cumming, Cas. Priv. Corp. 165.

¹¹² Decision of court of appeal in *Simm v. Telegraph Co.*, 5 Q. B. Div. 188, 2 Cumming, Cas. Priv. Corp. 165; *Hildyard v. South-Sea Co.*, 2 P. Wms. 76; *Boston & A. R. Co. v. Richardson*, 135 Mass. 473. See *Hall v. Road Co.*, 70 Ill. 673.

¹¹³ *Boston & A. R. Co. v. Richardson*, 135 Mass. 473.

¹¹⁴ See *Moores v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385, 2 Cumming, Cas. Priv. Corp. 144.

¹¹⁵ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 2 Cumming, Cas. Priv. Corp. 119; *Titus v. President, etc.*, 61 N. Y. 237; *Tome v. Railroad Co.*, 89 Md. 36, 17 Am. Rep. 540; *Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712, 2 Cumming, Cas. Priv. Corp. 149; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 199, 12 N. E. 433, 60 Am. Rep. 440; *Manhattan Beach Co. v. Harned (C. C.)* 27 Fed. 484; *Shaw v. Mining Co.*, 13 Q. B. Div. 103; *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Farrington v. Railroad Co.*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 47 N. E. 249, 43 L. R. A. 777; *post*, p. 512, note 387.

¹¹⁶ *Moores v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385, 2 Cumming, Cas. Priv. Corp. 144. In this case the plaintiff lent money to the cashier

to issue additional shares of stock, such certificates will be binding, and will make the purchasers stockholders. If, however, the full amount of stock authorized by the charter had already been issued, the certificates will be void, and the purchaser's only remedy against the corporation is an action for damages.¹¹⁷

No liability will attach to a corporation, in the absence of negligence, on account of certificates fraudulently issued by an officer, if the issuance of them had no relation whatever to the authority conferred upon him.¹¹⁸

A stock certificate issued by a corporation having power to issue the same, in which it is stated that a designated person is the owner of a certain number of shares of stock transferable on the books of the corporation, on the indorsement and surrender of the certificate, is a continuing affirmation as to the ownership of the stock, and that the corporation will not transfer the stock upon its books unless the certificate is first surrendered. It is an assurance to the commercial world that the shares of stock are the property of the person designated, and that he has the power and right to transfer and sell the stock, until this power and right has been lawfully terminated.¹¹⁹ It is therefore not only the right, but the duty, of a corporation not to register a transfer on its books and issue a new certificate to the transferee without production and surrender of the original certificate. This is generally expressly required by the terms of certificates, or by the charter or by-laws of the corporation, but the duty is the same where there is no such express requirement.¹²⁰ If a corporation does register a trans-

of the defendant bank on his representation that he owned stock in the bank which he would transfer to her as collateral to secure the loan. He fraudulently signed and issued a certificate directly to her, using blank certificates which had been signed by the president, and left with him to be used if needed, and marked the stub in the certificate book so as to show that the blank had been destroyed. The certificate showed on its face that stock was transferable only on the books of the bank, and on surrender of the original certificate. Of course, the plaintiff never saw any original certificate, and no certificate was or could have been surrendered, and there was no evidence that the bank had ever ratified the transaction, or received any benefit from it. It was held that the plaintiff could not hold the bank liable. And see *Farrington v. Railroad Co.*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; *Hill v. Publishing Co.*, 154 Mass. 172, 28 N. E. 142, 13 L. R. A. 193, 26 Am. St. Rep. 230. Compare *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Shaw v. Mining Co.*, 13 Q. B. Div. 103.

¹¹⁷ See the cases above cited.

¹¹⁸ Post, p. 518, and cases there referred to. Cf. *Whitechurch v. Cavanagh*, H. L. 17 Law Times R. 746.

¹¹⁹ *Joslyn v. Distilling Co.*, 44 Minn. 183, 46 N. W. 837, 2 Cumming, Cas. Priv. Corp. 177.

¹²⁰ 1 Cook, Stock, Stockh. & Corp. Law, §§ 358-360.

fer and issue a new certificate without surrender of the outstanding certificate, a bona fide purchaser of the new certificate may hold it liable thereon. If the corporation had the power to increase its stock, he will be entitled to shares. If it had no such power, the purchaser may maintain an action for damages. Purchasers of the outstanding certificates in such cases have a right to assume that no transfer has been made by the corporation, and cannot be affected by a transfer on its books of which they had no notice.¹²¹ If the corporation refuses to recognize them as stockholders by reason of their ownership of the outstanding certificate, they may maintain an action against it for damages, and recover the value of the stock.¹²²

If the corporation registers a transfer and issues a new certificate to a purchaser of stock, who did not receive the certificate and consequently did not surrender it, the transferee is not liable in damages to the holder of the old certificate, unless he obtained the registry with knowledge that the old certificate had been sold to another.* He may insist as a condition of purchase that the old certificate be surrendered; and, if he fails to do so, he assumes the risk and trouble that may arise from the outstanding certificate.†

REMEDY AGAINST CORPORATION FOR REFUSAL TO RECOGNIZE TRANSFER.

172. If a corporation, without legal ground, refuses to recognize and register a transfer, the transferee may sue in equity to compel it to do so, or may sue at law to recover the value of the stock. Some of the courts hold that mandamus is not a proper remedy, but it is allowed in some states.

If a corporation whose shares of stock are transferable only on its books refuses to register a transfer, without legal ground for such refusal, a court of equity may compel it to register the transfer, in a suit brought by the transferee for that purpose.¹²³ Or the transferee may

¹²¹ See *Hall v. Road Co.*, 70 Ill. 673.

¹²² *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 2 Cumming, Cas. Priv. Corp. 119; *Holbrook v. Zinc Co.*, 57 N. Y. 616, 2 Cumming, Cas. Priv. Corp. 152; *Bean v. Trust Co.*, 122 N. Y. 622, 26 N. E. 11, 2 Cumming, Cas. Priv. Corp. 179; *Joslyn v. Distilling Co.*, 44 Minn. 183, 46 N. W. 337, 2 Cumming, Cas. Priv. Corp. 177.

* *Scripture v. Frankestown Soapstone Co.*, 50 N. H. 571; *Baker v. Wasson*, 53 Tex. 150.

† *Boatmen's Ins. & Trust Co. v. Able*, 48 Mo. 136.

¹²³ *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Rice v. Rockefeller*, 134 N. Y. 174, 31 N. E. 907, 17 L. R. A. 237, 30 Am. St. Rep. 658, 2 Cumming, Cas. Priv. Corp. 181; *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338, 11 N.

maintain an action at law to recover damages for such refusal, and recover the value of the stock. He may maintain an action *ex delicto*, or he may maintain *assumpsit*, for the law implies a promise by the corporation to perform the duty which it owes to transferees of shares.¹²⁴

Some of the courts have held that *mandamus* is not a proper remedy to compel a corporation to recognize a person as a member, or to register transfers.¹²⁵ It has been allowed, however, in some states.¹²⁶

COMPELLING CORPORATION TO ISSUE NEW CERTIFICATES.

173. A corporation, not having been guilty of fraud or wrong, cannot be compelled to issue new certificates of stock while the old certificates are outstanding, unless the decree protects it against liability on the outstanding certificates.

Since a certificate of stock is a continuing affirmation by the corporation that the person designated is the owner of the stock, and has the right to transfer the same, so long as the certificate is outstanding, and it will be liable to bona fide purchasers of the certificate, it follows that the court cannot compel it to issue a new certificate on the ground that the old certificate was issued to the wrong person (there having been no fraud on the part of the corporation), so long as the old certificate is outstanding, unless by the decree it protects the corporation against liability on the outstanding certificate.¹²⁷ The corporation would be

W. 187; *Prince Investment Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079; *Real-Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048; *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431; *Bedford v. American Aluminum & Specialty Co.*, 51 App. Div. 537, 64 N. Y. Supp. 856.

¹²⁴ *Ang. & A. Corp.* § 381; *Kortright v. Bank*, 20 Wend. (N. Y.) 91; *Morgan v. Bank*, 8 Serg. & R. (Pa.) 73; *Sargent v. Insurance Co.*, 8 Pick. (Mass.) 90; *Case v. Bank*, 100 U. S. 446; *Pinkerton v. Railroad Co.*, 42 N. H. 424, 1 Cumming, Cas. Priv. Corp. 652; *Scripture v. Soapstone Co.*, 50 N. H. 571, 1 Cumming, Cas. Priv. Corp. 677; *London, Paris & American Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; *Herrick v. Humphrey Hardware Co.* (Neb.) 103 N. W. 685.

¹²⁵ *Lamphere v. Lodge*, 47 Mich. 429, 11 N. W. 268; *Baker v. Marshal*, 15 Minn. 177 (Gil. 136); *State v. Carpenter*, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. Rep. 556; *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582.

¹²⁶ *Green Mount & S. L. T. Co. v. Bulla*, 45 Ind. 1; *State v. McIver*, 2 S. C. 25; *People v. Crockett*, 9 Cal. 112; *In re Klaus*, 67 Wis. 401, 29 N. W. 582.

¹²⁷ *Joslyn v. Distilling Co.*, 44 Minn. 183, 46 N. W. 337, 2 Cumming, Cas. Priv. Corp. 177; *Bean v. Trust Co.*, 122 N. Y. 622, 26 N. E. 11, 2 Cumming, Cas. Priv. Corp. 179. Where it clearly appeared that the original certificate, unassigned, had been lost twelve years ago, and had not since been heard from, and no other claimant for the stock or dividends had appeared, the

liable to bona fide purchasers of the outstanding certificate even pending a suit to cancel the same and to compel the issuance of the new certificate, for the doctrine of *lis pendens*, as we have seen, does not apply to the sale and transfer of shares of stock.¹²⁹ The later cases seem to show that not even a decree of the court declaring an outstanding certificate void, and canceling the same, would relieve the corporation from liability to bona fide purchasers of the outstanding certificate without notice of the suit or the decree.¹³⁰

owner was entitled to a new certificate without giving a bond of indemnity *Gulford v. Western Union Tel. Co.*, 59 Minn. 332, 61 N. W. 824, 50 Am. St. Rep. 407. An action may be maintained against a foreign corporation to compel it to issue a new certificate in place of one which had been lost. *Gulford v. Western Union Tel. Co.*, *supra*.

¹²⁹ *Holbrook v. Zinc Co.*, 57 N. Y. 616, 2 Cumming, Cas. Priv. Corp. 152.

¹³⁰ See the cases cited in note 97, *supra*. But see, *contra*, *Sprague v. Manufacturing Co.*, Fed. Cas. No. 13,249, 1 Cumming, Cas. Priv. Corp. 661.

CHAPTER XIII.

MANAGEMENT OF CORPORATIONS—OFFICERS AND AGENTS.

- 174–177. Powers of the Majority of Stockholders.
- 178–181. By-Laws.
- 182–184. Stockholders' Meetings.
- 185–188. Voting.
- 189–190. Election and Appointment of Officers and Agents.
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- 193–194. Directors' Meetings and Resolutions.
- 195–197. Authority of Other Officers and Agents.
- 198. Notice to Officer as Notice to Corporation.
- 199. Contracts between Stockholder and the Corporation.
- 200. Relation between Officers and Corporation.
- 201–202. Contracts or Other Transactions between Officers and the Corporation.
- 203. Liability of Officers to the Corporation.
- 204–205. Remedies against Officers.
- 206. Liability of Officers and Agents on Contracts.
- 207–209. Liability of Corporation for Torts of Officers and Agents.
- 210. Liability of Officers and Agents to Third Persons for Torts.
- 211. Compensation of Officers.
- 212. Removal of Officers and Agents.
- 213. Relation between Officers and Stockholders.

POWERS OF THE MAJORITY OF STOCKHOLDERS.

- 174. As a rule, each shareholder in a corporation is bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law.
- 175. But, if the charter invests the board of directors or other agents with the power to manage the concerns of the corporation, the power is exclusive, and cannot be controlled or interfered with by the stockholders, their remedy being to elect or appoint new directors or agents.
- 176. The majority cannot bind the minority by ultra vires acts; nor can they defeat or impair contract rights between the corporation and individual stockholders; nor can they act fraudulently or oppressively, as against the minority.
- 177. There is much conflict as to the power of the majority to bind a dissenting minority by acceptance of an amendment or alteration of its charter. The position of the courts may be shortly stated thus:

- (a) Where the legislature has not reserved the power to amend the charter—
 - (1) By the weight of authority, the legislature cannot authorize the majority to alter the charter in any material respect, without the consent of the minority.
 - (2) All the courts agree that it cannot authorize the majority to engage in a new and different enterprise.
 - (3) Perhaps all the courts agree that immaterial changes may be made, to facilitate carrying out the objects of the corporation.
 - (4) Some courts hold that a material alteration, if not a great or radical one, may be made to facilitate carrying out the objects of the corporation.
- (b) Where the legislature has reserved the power to alter or amend the charter—
 - (1) Some courts hold that each stockholder impliedly consents that the majority may, under legislative sanction, engage in new enterprises of the same kind as that authorized by the charter.
 - (2) Other courts hold that the reservation is intended for the benefit of the public, and can be exercised by the state only, and that it can give no greater power to the majority than if it did not exist.

It is a fundamental principle that the majority of the stockholders can regulate and control the exercise of the powers conferred upon a corporation by its charter, and that the majority has the power, by a vote duly taken and ascertained according to the law by which it is governed, to bind the minority by any act or proceeding which is within the powers and authority of the corporation. Each and every shareholder impliedly agrees that the will of the majority shall govern in all matters coming within the limits of the charter or act of incorporation.¹ Thus, the majority of a corporation established solely for private objects, as a manufacturing or trading corporation, may wind up its affairs, close out its business, and sell its property, against the dissent of the minority, whenever, in the exercise of a sound discretion, they find it expedient to do so.²

¹ *Durfee v. Railroad Co.*, 5 Allen (Mass.) 230, 242, 1 Cumming, Cas. Priv. Corp. 773; *Dudley v. Kentucky High School*, 9 Bush (Ky.) 578, 1 Cumming, Cas. Priv. Corp. 767; *Hodge v. United States Steel Corp.* (N. J. Err. & App.) 54 Atl. 1; *Metcalf v. American School Furniture Co.* (C. C.) 122 Fed. 115.

² *Treadwell v. Manufacturing Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490; *Peabody v. Westerly Waterworks*, 20 R. I. 176, 37 Atl. 807; *Phillips v. Providence Steam-Engine Co.*, 20 R. I. 1, 43 Atl. 598, 45 L. R. A. 560. And see *Hinds County v. Natchez, J. & C. R. Co.*, 85 Miss. 599, 38 So. 189, 107 Am. St. Rep. 305. But see *Taylor v. Earle*, 8 Hun (N. Y.) 1. If the sale is not required by the exigencies, a majority may not sell regardless of the rights of a dissenting minority. *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; *Small v. Minneapolis Electric Matrix Co.*, 45 Minn. 264, 47 N. W. 797; *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 South. 513; *Forrester v.*

Of course, the majority of the stockholders have no power to bind the minority by any act or proceeding that is not within the powers conferred upon the corporation by its charter. The majority represents the corporation, and it can legally do nothing that the corporation cannot do under its grant of power. The majority cannot, at least in the absence of legislative authority, binding upon the stockholders, change the articles of association or charter. They cannot, by resolution, dissolve the corporation before expiration of the time fixed in the charter or articles of association, without the consent of all the members, unless express authority is conferred by the charter.³

And, while a majority of the stockholders may bind the individual stockholders in all matters legitimately within the powers of the company, and subject to the law of the land, they cannot impair or defeat contract rights between the corporation and individual stockholders.⁴ Thus, where a corporation has issued to a stockholder a certificate in the form of an ordinary certificate of stock, but containing a promise by the corporation to pay interest thereon until the happening of a specified event, it cannot, by vote of a majority of the stockholders, without his consent, oblige him to receive the bond of the corporation, instead of money, for the interest on such certificate.⁵

Nor can the holders of a majority of the stock of a corporation so conduct and manage its affairs in their own interest, or in the interest of others, as to oppress the minority, or commit a fraud upon their rights. If they attempt to do so, a court of equity will, in a proper case, grant relief, at the suit of the minority.⁶ "The holders of a majority of the stock of a corporation may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus as-

Boston & M. Consol. C. & S. Min. Co., 21 Mont. 544, 55 Pac. 229, 353. Cf. *Hunt v. American Grocery Co.* (C. C.) 81 Fed. 532. It is competent for the directors and a majority of the stockholders of a joint-stock manufacturing corporation, against the will of the minority, to lease its plant to a corporation which is to carry on the same business. *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 38 Atl. 45, 61 Am. St. Rep. 57. Cf. *Parsons v. Tacoma Smelting & R. R. Co.*, 25 Wash. 492, 65 Pac. 765. As to the power of a corporation to sell its property, and the limitations thereon, see ante, p. 132.

³ *Barton v. Association*, 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608.

⁴ *Durfee v. Railroad Co.*, supra.

⁵ *McLaughlin v. Railroad Co.*, 8 Mich. 100.

⁶ Ante, p. 375, and cases there cited; *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, 2 Cumming, Cas. Priv. Corp. 234; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 30 N. E. 667, 32 Am. St. Rep. 315; *Farmers' Loan & T. Co. v. New York & M. Ry. Co.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; *Armington v. Palmer*, 21 R. I. 109, 42 Atl. 308, 43 L. R. A. 95, 79 Am. St. Rep. 786; *Mumford v. Ecuador Development Co.* (C. C.) 111 Fed. 639.

suming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests, to the injury of other stockholders." ⁷ It is not every question of mere administration or of policy in which there is a difference of opinion among the shareholders that gives the minority a right to claim that the action of the majority is oppressive, and to come into a court of equity for relief. Generally, the will of the majority must govern, if its action is within its corporate powers. "The court," it was said in a New York case, "would not be justified in interfering, even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the carrying out of the opposite policy. This is no business for any court to follow." ⁸

Where Power of Management is in the Directors.

When the charter invests a board of directors or trustees with the power to manage the concerns of the corporation, the power is exclusive in its character. The stockholders, as such, in their collective capacity, can do no corporate act. The directors are their representatives, and they only are authorized to act.⁹ Thus, conferring authority

⁷ Meeker v. Iron Co. (C. C.) 17 Fed. 48.

⁸ Per Peckham, J., in Gamble v. Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527. Where a contract between two corporations, made by the directors, several of whom were common to both corporations, was ratified by a majority of the stockholders of each, it could not, in the absence of any proof that it was calculated to defraud the minority stockholders, be set aside at their suit. Continental Ins. Co. v. New York & H. R. Co., 93 N. Y. Supp. 27, 103 App. Div. 282.

⁹ McCullough v. Moss, 5 Denio (N. Y.) 575; Sellers v. Greer, 172 Ill. 549, 50 N. E. 246.

to sell and convey or to lease the property of the corporation, or to execute corporate obligations, is the exercise of a corporate power, and, if the charter requires such powers to be exercised by the board of directors or trustees, such authority cannot be conferred by a stockholders' meeting.¹⁰ Nor can the stockholders, in such a case, control or interfere with the board in the exercise of its powers. The courts will not, even on the petition of a majority of stockholders, compel the board to do an act contrary to its judgment.¹¹

Power to Accept Amendment or Alteration of Charter.

Difficult questions arise as to the power of the majority of the members of a corporation to bind a dissenting minority by acceptance of an act amending or altering the charter. On some points the courts agree, while on others there is a wide difference of opinion, and a conflict in the decisions. We considered in a previous chapter the power of the state to amend a charter irrespective of the consent of the corporation. We are to consider here the power of a majority of the corporation where the legislature merely authorizes a change, leaving it optional with the corporation whether it will make the change, or continue under the original charter.

Even where the legislature has not reserved the power to alter or amend a charter, there is nothing to prevent it from doing so with the consent of all the members. It would be just like the case where both parties to a contract rescind it by mutual agreement, and substitute a new contract. It seems clear, however, that the legislature cannot, where it has not reserved the power, alter a charter in any material respect,—that is, make any fundamental change,—if any one of the stockholders or members dissent, for it would thereby impair the obligation of the contract between the dissenting member and the corporation. Nor can it authorize a majority of the members to make the alteration. A person, in becoming a member of a corporation, does not impliedly agree that the majority of the members shall have the power to bind him by alteration of the objects of the incorporation, or by altering his contract of membership. The majority of the members have no more power to alter the charter, and engage in a new or different enterprise, against the dissent of the minority, than two members of a partnership of three would have the power to change the partnership agreement without the consent of the third.

¹⁰ *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Conro v. Iron Co.*, 12 Barb. (N. Y.) 27; *McCullough v. Moss*, 5 Denio (N. Y.) 575; *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843, 38 C. C. A. 433.

¹¹ *McCullough v. Moss*, 5 Denio (N. Y.) 575; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, 713, 714; *Ellerman v. Chicago Junction R. Co.*, 49 N. J. Eq. 219, 28 Atl. 237.

A leading case on this point is *Natusch v. Irving*.¹² In this case a partnership had been formed for life insurance, and, after it was entered into, an act of parliament made it lawful for such a firm to enter upon the business of marine insurance, which was prohibited to them before. A majority of the partners determined to embark in this new business, but Lord Eldon held that they were barred from doing so by the contract of partnership, unless all the partners agreed. And in England the same doctrine has been applied to corporations. And so it has been held in this country.¹³ The legislature, if it has not reserved the power to alter or amend the charter of a corporation, cannot authorize a material or fundamental amendment, and put it in the power of a majority of the members, even by express provision to that effect, to bind the minority against their dissent; for this would be to impair the contract between such dissenting members and the corporation, and the act would be unconstitutional.

In *Proprietors of Union Locks & Canals v. Towne*,¹⁴ the original charter of a corporation empowered it to render the Merrimack river navigable between certain points, and for that purpose to purchase lands, not exceeding six acres, and to collect tolls, for 40 years, not averaging over 12 per cent. on the capital invested. Afterwards an amendatory act was passed, on the petition of the corporation, abolishing all limitation upon the amount and duration of the toll collected, and authorizing the corporation to purchase and hold 100 acres of land. It was held that this amendment was a material alteration of the charter, and discharged a dissenting subscriber to stock in the corporation from liability on his subscription. On the same principle it has been held that a subscriber to stock in a railroad company was released from liability on his subscription by an amendment of the charter, without his consent, superadding to the original object of the corporation an authority to establish a line of water communication in connection with the railroad, and to increase the capital stock for that purpose.¹⁵

¹² 2 Coop. t. Cott. 358, Gow, Partn. (3d Ed.) 576, and referred in *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, 1 Cumming, Cas. Priv. Corp. 781, 784.

¹³ In *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582, 1 Cumming, Cas. Priv. Corp. 902, a charter authorizing a company to transact a "life and accident insurance" business was amended so as to authorize it to do the business of "fire, marine, and inland insurance," and the amendatory act was accepted by a majority of the stockholders. It was held that this released a dissenting member from liability on a note given by him for an assessment on his stock.

¹⁴ 1 N. H. 44, 8 Am. Dec. 82.

¹⁵ *Hartford & N. H. R. Co. v. Croswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354, 1 Cumming, Cas. Priv. Corp. 894.

Like decisions have been made where the charter of a railroad or turnpike corporation was amended so as to allow it to materially change the location of the road;¹⁶ where the capital stock of a corporation was increased from \$50,000 to \$150,000,¹⁷ where railroad corporations were authorized to consolidate;¹⁸ where a railroad company was authorized to extend its road.¹⁹

The general rule, however seems to be well settled that a member of a corporation cannot claim release from liability on his subscription, or otherwise object, because the majority have made an immaterial alteration or amendment under legislative authority. But there is much diversity of opinion as to what alterations are material or fundamental within the rule. If the alteration does not materially affect the contract between the corporation and its members, the majority have the power to make it under legislative sanction, and they will not be enjoined at the suit of a dissenting member, nor will he be released from liability on his subscription. This principle has been applied to amendatory acts, accepted by the majority, changing the name of the corporation,²⁰ enlarging the time within which a railroad company may commence and complete its road,²¹ or an hotel company may construct its hotel;²² changing to a slight extent the location or grade of the road of a turnpike or railroad company;²³ authorizing the issue of preferred stock for the purpose of raising money;²⁴ increasing the number of directors.²⁵ In the latter case it was said that alterations which change the nature and purposes of the corporation, or of the enterprise for which it was created, are fundamental,

¹⁶ *Middlesex Turnpike Corp. v. Locke*, 8 Mass. 268; *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13, 1 Cumming, Cas. Priv. Corp. 897.

¹⁷ *Hughes v. Manufacturing Co.*, 34 Md. 316, 330. But see *Schenectady & S. P. R. Co. v. Thatcher*, 11 N. Y. 102.

¹⁸ *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604; *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13, 1 Cumming, Cas. Priv. Corp. 897; *Mowrey v. Railroad Co.*, 4 Biss. 78, Fed. Cas. No. 9,891.

¹⁹ *Stevens v. Railroad Co.*, 29 Vt. 545. And see *Zabriskie v. Railroad Co.*, post, p. 438. But see *Durfee v. Railroad Co.*, post, p. 438.

²⁰ *Taggart v. Railroad Co.*, 24 Md. 563, 89 Am. Dec. 760; *Clark v. Navigation Co.*, 10 Watts (Pa.) 364.

²¹ *Taggart v. Railroad Co.*, 24 Md. 563, 89 Am. Dec. 760; *Milford & C. Turnpike Co. v. Brush*, 10 Ohio, 111, 36 Am. Dec. 78; *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29.

²² *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536.

²³ *Milford & C. Turnpike Co. v. Brush*, 10 Ohio, 111, 36 Am. Dec. 78; *Banet v. Railroad Co.*, 13 Ill. 504; *Irvin v. Turnpike Co.*, 2 Pen. & W. (Pa.) 466, 23 Am. Dec. 53.

²⁴ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Everhart v. Railroad Co.*, 28 Pa. 339.

²⁵ *Mower v. Staples*, 32 Minn. 284, 20 N. W. 225.

while those which work no material change are not fundamental, and that an alteration increasing the number of directors, not being a change of the nature, purpose, or character of the corporation, or of the enterprise, but of the machinery by which that purpose is to be effected, and that enterprise carried on, is not fundamental, and may therefore be accepted by a majority of the stockholders.

Some of the courts have gone further than this, and have held that a majority of the stockholders of a corporation may bind the minority by acceptance of an act materially altering the charter, if the alteration is made in order to facilitate the execution of the object for which the corporation was originally established, and which is beneficial to the stockholders, or clearly not prejudicial, while some have said that they may make a change if it is not a great or radical one. Such seems to be the rule in New York, Illinois, and Missouri, and it perhaps extends to other states.²⁶ In *Banet v. Alton & S. R. Co.*,²⁷ it was said: "An alteration in a charter may be so extensive as to work a dissolution of the contract of subscription. An amendment which essentially changes the nature or objects of a corporation will not be binding on the stockholders. A corporation formed for the purpose of constructing a railroad cannot be converted into a company to construct an improvement of a different character, without the consent of all the corporators. A road intended to secure the advantages of

²⁶ *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Banet v. Railroad Co.*, 13 Ill. 504; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354, 1 Cumming, Cas. Priv. Corp. 894; *Pacific R. R. v. Renshaw*, 18 Mo. 210; *Pacific R. R. v. Hughes*, 22 Mo. 291, 64 Am. Dec. 265; *Park v. Modern Woodmen*, 181 Ill. 214, 54 N. E. 932. A reservation of the right of amendment in the articles of association of a life insurance company, except with regard to keeping intact the fund pledged to secure payment of death losses, empowers the company to bind its members by a change in its plan of doing business from the assessment plan to the legal reserve, flat premium plan of "old line" insurance. *Wright v. Minnesota Mut. L. Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832. In the last case the court said: "Where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right." See, also, *Picard v. Hughey*, 58 Ohio St. 577, 51 N. E. 133. It has been held in Pennsylvania that granting additional privileges beneficial to the corporation does not release a subscriber, though it may extend the liabilities of the company. *Gray v. Navigation Co.*, 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500; *Clark v. Navigation Co.*, 10 Watts (Pa.) 364.

²⁷ 13 Ill. 504.

a particular line of travel and transportation cannot be so changed as to defeat that general object. The corporation must remain substantially the same, and be designed to accomplish the same general purposes and subserve the same general interests. But such amendments of the charter as may be considered useful to the public and beneficial to the corporation, and which will not divert its property to new and different purposes, may be made, without absolving the subscribers from their engagements. The straightening of the line of the road, the location of a bridge at a different place on a stream, or a deviation in the route from an intermediate point, will not have the effect to destroy or impair the contract between the corporation and the subscribers. We regard these conclusions as reasonable and just, and as well calculated to facilitate the construction of improvements and promote the best interests of the public and of stockholders. The incidental benefits which a few subscribers may realize from a particular location ought not to interfere with the general interests of the public and of the great mass of the corporators. These interests of the public and of the corporation may with propriety be consulted and encouraged, especially where the alteration will not operate to depreciate the value of the stock. A shareholder has no cause to complain of the loss of a mere incidental benefit, which formed no part of the consideration of his contract of subscription."

The question arises whether this doctrine applies where the legislature has reserved the power to alter, amend, or repeal a charter, and offers the corporation an amendment of its charter authorizing it to engage in an enterprise not originally contemplated. On this point the courts do not agree.

Some courts have taken the view that a person who becomes a member of a corporation, when such power has been reserved by the legislature, impliedly agrees that in case an amendment of its charter is offered by the legislature, authorizing it to engage in a new enterprise of the same kind as that authorized by the charter, it shall be for the corporation, as a body, to determine whether it will accept the same, and that the will of the majority shall govern. In *Durfee v. Old Colony & F. R. R. Co.*,²⁸ the legislature, under a reservation of power to alter, amend, or repeal the charter of a railroad company, passed an act authorizing it to engage in a new enterprise in addition to that contemplated by its charter, but of the same kind,—to extend its road,—and the amendment was accepted by vote of a majority of the stockholders. It was held that this was a matter in which the stockholders had impliedly agreed that the will of the majority should

²⁸ 5 Allen (Mass.) 230, 1 Cumming, Cas. Priv. Corp. 773.

govern, and that the action of the majority was binding upon the dissenting minority. "When," said the court in this case, "it is expressly provided between the legislature, on the one hand, and the corporation, on the other, as part of the original contract of incorporation, that the former may change or modify or abrogate it, or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the legislature with the corporation that the original act of incorporation should undergo no change except with his assent. Such a position might be asserted with more plausibility if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might, perhaps, be maintained that there was a strong implication that the charter should remain inviolate, and that the holders of shares invested their property in the corporation relying upon a contract entered into between it and the legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: By the parties to the contract,—the legislature on the one hand, and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party." There are other cases to the same effect.²⁹

Other courts repudiate this view, and hold that no material change can be made in the charter of a corporation without the consent of all the stockholders, though authorized by the legislature under a reserved power to alter, amend, or repeal the original charter. In *Zabriskie v. Hackensack & N. Y. R. Co.*,³⁰ a railroad company, whose charter was subject to alteration, amendment, or repeal by the legislature, was by an amendatory act authorized to extend its road, and to issue bonds for the purpose of constructing the extension, and secure them by a mortgage on its road and franchises. It was held that this act

²⁹ *White v. Railroad Co.*, 14 Barb. (N. Y.) 560; *Schenectady & S. Plank-Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. C. R. Co. v. Dudley*, 14 N. Y. 336; *Picard v. Hughey*, 58 Ohio St. 577, 51 N. E. 133.

³⁰ 18 N. J. Eq. 178, 90 Am. Dec. 617, 1 Cumming, Cas. Priv. Corp. 781.

could not be accepted by the corporation where a stockholder dissented, and the corporation was enjoined, at the suit of a dissenting stockholder, from acting under it. The court said that the reservation by the state of the power to alter, amend, or repeal the charter was for the benefit of the public, and to be exercised by the state only, and was not intended to give a power to one part of the corporators, as against the other, which they did not have before; that the object of the provision was to avoid the rule of the Dartmouth College Case,³¹ and not the rule of *Natusch v. Irving*.³²

BY-LAWS.

178. Every private corporation for pecuniary profit has the implied power to enact by-laws for its government. But, to be valid, by-laws—

- (a) **Must be reasonable.**
- (b) **Must not be inconsistent with principles of law, nor contrary to public policy.**
- (c) **Must be general, and not directed against particular individuals.**
- (d) **Must be consistent with the charter or articles of association, and within the purposes of the corporation.**
- (e) **Must not impair vested contract rights of stockholders, either by depriving them of rights, or by imposing additional liabilities.**

179. Authorized by-laws are binding upon all the stockholders, whether they have expressly assented to them, or knew of them, or not.

180. By-laws cannot confer rights, or impose liabilities, upon third persons, without their express or implied consent.

181. By-laws may be altered or repealed by the corporation at pleasure, and they may be waived.

The office of a by-law is to regulate the conduct and define the duties of the members of the corporation to the corporation and between themselves.³³ Every private business corporation has the implied power to make by-laws. The power is often expressly conferred by the charter or by statute, but this is not at all necessary, for the power

³¹ Ante, p. 202.

³² Ante, p. 435. And see *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571; *In re Election of Directors of Newark Library Ass'n*, 64 N. J. Law, 217, 43 Atl. 435; *Alexander v. Atlanta & W. P. R. Co.*, 108 Ga. 151, 33 S. E. 866.

³³ *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691; *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; *Davies v. Munroe Waterworks & L. Co.*, 107 La. 145, 31 South. 694; *Flaherty v. Portland Longshoremen's Benev. Soc.*, 99 Me. 253, 59 Atl. 58.

is always implied.³⁴ Primarily, the power to make by-laws is in the majority of the stockholders.³⁵ But, they, or the charter, may authorize the board of directors to make them.³⁶ They may also, by a by-law authorize the board to alter or amend by-laws; but the board, under such a power, has no authority to disregard or alter another by-law, which was intended to impose a limitation on their powers.³⁷ Usage may have the effect of a by-law.³⁸

By-laws of a corporation must be proved. They cannot be judicially noticed.³⁹ They are to be proved by the records of the corporation, or by secondary evidence if the records cannot be produced.

Validity of By-Laws.

Any by-law prescribing a rule for the government of the corporation is valid if it is reasonable, and if it is not inconsistent with the charter or articles of association, nor contrary to any statute or principle of the common law, and if it does not impair vested rights.⁴⁰ The corporation, for instance, may provide by its by-laws for the election or appointment and the removal of officers and agents, and may prescribe and limit their powers and duties.⁴¹ So, it may prescribe how and when corporate meetings shall be held, how they shall be

³⁴ Sutton's Hospital Case, 10 Coke, 23a, 30b, 2 Cumming, Cas. Priv. Corp. 14; 1 Bl. Comm. 475, 2 Cumming, Cas. Priv. Corp. 16; 1 Kyd, Corp. 69, 2 Cumming, Cas. Priv. Corp. 17; 2 Kent, Comm. 278; Norris v. Staps, Hob. 211a; and cases cited in the following notes.

³⁵ A change in the by-laws, increasing the number of directors, cannot be made at a regular or annual stockholders' meeting, without previous notice of such purpose; the amendment being of vital importance and outside the usual business transacted at such meetings. Bagley v. Reno. Oil Co., 201 Pa. 78, 50 Atl. 760, 56 L. R. A. 184. A statute placing the stock, property, and affairs of corporations under the care and management of its directors does not empower them to adopt by-laws. North Milwaukee Town-Site Co. v. Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174.

³⁶ Cahill v. Insurance Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Heintzelman v. Druids' Relief Ass'n, 38 Minn. 138, 36 N. W. 100. If the charter authorizes the directors to adopt by-laws, a majority may do so. Cahill v. Insurance Co., supra.

³⁷ Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

³⁸ Walker v. Johnson, 17 D. C. App. 144; Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

³⁹ Haven v. Asylum, 13 N. H. 532, 38 Am. Dec. 512.

⁴⁰ Burden v. Burden, 159 N. Y. 287, 55 N. E. 17; Renn v. United States Cement Co. (Ind. App.) 73 N. E. 269.

⁴¹ Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; Burden v. Burden, 8 App. Div. 160, 40 N. Y. Supp. 499; Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410. They may require officers to give bond. Savings Bank of Hannibal v. Hunt, 72 Mo. 597, 37 Am. Rep. 449.

conducted, the manner of voting, etc.⁴² And it may prescribe, for its own protection, reasonable regulations concerning the transfer of shares, if it does not unreasonably restrict the right of transfer.⁴³

And corporations other than joint-stock corporations may enact reasonable by-laws providing for the expulsion of members.⁴⁴

It is well settled that by-laws, to be valid, must be reasonable, and not in contravention of law.⁴⁵ And whether they are so or not is a question for the court to determine.⁴⁶ For instance, they must not be in restraint of trade, nor impose a burden without any apparent benefit.⁴⁷ Nor is a by-law valid if it is inconsistent with other general principles of law.⁴⁸ A by-law cannot affect the jurisdiction of courts, as fixed by law, nor impair the right to sue.⁴⁹ Nor can it give the corporation the power to declare shares forfeited for nonpayment of calls.⁵⁰

To be reasonable, and therefore to be valid, by-laws must be general; that is, they must not be directed against particular individuals,

⁴² *State v. Tudor*, 5 Day (Conn.) 329, 5 Am. Dec. 162; *In re Election of Directors of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628. But a by-law cannot change charter or statutory provisions as to voting, nor deprive members of the right to vote secured to them by their contract of membership. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *post*, p. 462. A by-law may give stockholders a vote for each share, contrary to the common-law rule. *Com. v. Detwiller*, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360. *Contra*, *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33. A by-law may allow voting by proxy. *Com. v. Detwiller*, *supra*; *State v. Tudor*, *supra*; *People v. Crossley*, 69 Ill. 195. *Contra*, *Taylor v. Griswold*, *supra*.

⁴³ *Post*, p. 443.

⁴⁴ *Ante*, p. 389.

⁴⁵ *State v. Citizens' Bank*, 51 La. Ann. 426, 25 South. 318; *Wells v. Black*, 117 Cal. 157, 48 Pac. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162; *Herring v. Ruskin Co-op. Ass'n* (Tenn. Ch. App.) 52 S. W. 327; *Darrin v. Hoff*, 99 Md. 491, 58 Atl. 196; *Stein v. Marks* (Sup.) 89 N. Y. Supp. 921.

⁴⁶ *Com. v. Worcester*, 8 Pick. (Mass.) 462; *State v. Overton*, 24 N. J. Law, 435, 61 Am. Dec. 671; *Sayre v. Association*, 1 Duv. (Ky.) 143, 85 Am. Dec. 613; *People v. Young Men's Father Matthew T. A. B. Soc.*, 41 Mich. 67, 1 N. W. 931; *Palmetto Lodge No. 5 v. Hubbell*, 2 Strob. (S. C.) 457, 49 Am. Dec. 604; *Vestry of St. Luke's Church v. Mathews*, 4 Desaus. Eq. (S. C.) 578, 6 Am. Dec. 619. As to reasonableness of by-laws providing grounds for expulsion of members, see *ante*, p. 389. *et seq.*

⁴⁷ *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741; *Sargent v. Insurance Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *Bailey v. Association of Master Plumbers*, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561, and cases hereafter specifically referred to.

⁴⁸ *Kent v. Mining Co.*, 78 N. Y. 159, 182; *Sayre v. Association*, 1 Duv. (Ky.) 143, 85 Am. Dec. 613.

⁴⁹ *Nute v. Insurance Co.*, 6 Gray (Mass.) 174; *Amesbury v. Insurance Co.*, *Id.* 596.

⁵⁰ *In re Election of Directors of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

nor in favor of particular individuals, but must operate equally upon all to whom they may apply. In *Budd v. Multnomah St. Ry. Co.*,⁵¹ the directors of a corporation passed a resolution to forfeit and sell the shares of a particular individual for nonpayment of assessments, and the sale was sought to be upheld under a statute requiring a by-law to authorize such sales. The court held that the resolution was not valid as a by-law, because it was not general. "I think," said Judge Strahan, "that any by-law enacted under this section of the Code, to be reasonable, ought to be general; that is, it ought to affect every delinquent subscriber, and all delinquent stock, alike, and it ought not to be directed against the stock or interests of a particular stockholder. These are essential requisites to a valid by-law." There are many other decisions to the same effect.⁵²

A corporation may adopt by-laws imposing reasonable regulations upon the mode of transferring shares but it cannot prohibit transfers. Nor can it impose unreasonable regulations. It has been held, for instance, that a by-law prohibiting the transfer of stock by a stockholder without the consent of all the stockholders, or of a particular officer, etc., is against public policy and void; and no exception can be made in the application of this rule on the ground that the stockholders are few, and were originally co-partners, and that the one against whom the by-law is invoked consented to and voted for it.⁵³

Whether or not, in the absence of express charter or statutory authority, a corporation may, by a by-law, create a lien on its shares for debts due from its stockholders, is a question upon which the courts do not entirely agree. By the weight of authority, under the general power to regulate the manner in which its stock shall be transferred and its business conducted, etc., a by-law creating a lien on shares for debts due from its stockholders will be valid as against the

⁵¹ 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60.

⁵² "It is plain that all corporation by-laws must stand on their own validity, and not on any dispensation granted to members. They cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive, as matter of grace, anything which is matter of right. Neither, on the other hand, should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporators." Per Campbell, C. J., in *People v. Young Men's Father Matthew T. A. B. Soc.*, 41 Mich. 67, 1 N. W. 931.

⁵³ In re *Petition of Klaus*, 67 Wis. 401, 29 N. W. 582. And see *Farmers' & Merchants' Bank of Llineville v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 308; *Sargent v. Insurance Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 501; *Moore v. Bank*, 52 Mo. 377; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, 1 Cumming, Cas. Priv. Corp. 608, affirmed *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 582; *Chouteau Spring Co. v. Harris*, 20 Mo. 383; ante, p. 407.

stockholders, and as against transferees who do not occupy the position of bona fide purchasers.⁵⁴ But such a by-law is not binding upon bona fide purchasers of shares, without notice of it.⁵⁵ The New York court, it seems, has held such a by-law invalid for all purposes, in the absence of legislative authority therefor, on the ground that it is unreasonable, not only because it interferes with the common rights of property, and the dealings of third persons, and prevents the free purchase and transfer or delivery of property, but also for the reason that it gives to the corporation a summary remedy which is unknown to the law, and which subjects shares to what is equivalent to an attachment or an execution without judgment or suit.⁵⁶

In the absence of express authority, a corporation cannot, by a by-law, provide for forfeiture of stock for nonpayment of assessments thereon.⁵⁷ But it can do so if expressly authorized.⁵⁸

A corporation has no authority to pass by-laws that are inconsistent with the charter or articles of association, or that are beyond the scope of the purposes of the corporation, as expressed in the charter or articles.⁵⁹ Thus, a corporation cannot, by a by-law, acquire a lien on its shares for debts due to it by the stockholders, if it is expressly

⁵⁴ *Morgan v. Bank*, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575; *Vansands v. Bank*, 26 Conn. 144; *Lockwood v. Bank*, 9 R. I. 308; *Cunningham v. Trust Co.*, 4 Ala. 652; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Child v. Hudson's Bay Co.*, 2 P. Wms. 207; *M'Dowell v. Bank*, 1 Har. (Del.) 27; *Bronson Electric Co. v. Rheubottom*, 122 Mich. 608, 81 N. W. 563. And see 1 *Thomp. Corp.* § 1032, citing, among other cases, *People v. Crockett*, 9 Cal. 112; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513, 100 Am. Dec. 388; *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330; *Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585.

⁵⁵ *Driscoll v. Manufacturing Co.*, 59 N. Y. 96, 109; *Brinkerhoff-Farris Trust & S. Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *John C. Grafflin Co. v. Woodside*, 87 Md. 146, 39 Atl. 413; *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200; *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226, 102 Am. St. Rep. 115.

⁵⁶ *Driscoll v. Manufacturing Co.*, *supra*.

⁵⁷ *Cahill v. Insurance Co.*, 2 Doug. (Mich.) 124, 43 Am. Dec. 457; *In re Election of Directors of Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; *ante*, p. 309.

⁵⁸ *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169, W. D. Smith, Cas. Corp. 60; *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654.

⁵⁹ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Bergman v. Association*, 29 Minn. 275, 13 N. W. 120; *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215, 50 N. W. 1036; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; *Supreme Council v. Perry*, 140 Mass. 580, 5 N. E. 634; *Vestry of St. Luke's Church v. Mathews*, 4 Desaus (S. C.) 578, 6 Am. Dec. 619; *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668, 39 Atl. 527; *King v. International Building & L. Ass'n*, 170 Ill. 135, 48 N. E. 677; *Steiner v. Steiner Land & L. Co.*, 120 Ala. 128, 26 South. 494.

or impliedly prohibited from acquiring a lien on shares, as are national banks by the prohibition in the national banking act against making loans on the security of their shares.⁶⁰ Where the charter of a corporation, or a general statute applicable to it, confers power to enact by-laws for certain specified purposes, it cannot enact a by-law for any other purpose. The case is within the rule, "*Expressio unius est exclusio alterius*."⁶¹ A corporation whose charter vests the management of its affairs in a board of directors cannot, by a by-law, substitute an executive committee for such board.⁶²

Nor can a corporation, by a by-law, deprive a stockholder of vested contract rights, to which he is entitled by virtue of his contract of membership, or of any other contract with the corporation, or of any contract with third persons. In other words, a by-law cannot deprive a stockholder of any rights vested in him at the time it is enacted, unless he consents, or unless his contract with the company allows it.⁶³ Nor can a by-law impose upon a stockholder, without his consent, any new liability. Thus, where neither the charter of a corporation, nor any general statute, imposes on the individual members a liability to pay its debts, such liability cannot be imposed by a by-law to which he does not consent.⁶⁴ A person becoming a member of a corporation after a by-law has been adopted, prohibiting members from doing certain things, is bound thereby. It is a part of his contract, and he cannot object to it on the ground that it deprives him of vested rights.⁶⁵

A by-law which consists of several distinct and independent parts may be valid as to one part, though void as to the others. Thus, where a by-law of a mutual insurance company provided that in case of loss, if the assured should not acquiesce in the determination by the directors of the amount thereof, any action for the loss claimed must be brought within four months after such determination, at a proper court in the county in which the office of the company was established,

⁶⁰ *Bullard v. Bank*, 18 Wall. 589, 21 L. Ed. 923; *Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *Conklin v. Bank*, 45 N. Y. 655.

⁶¹ *Ireland v. Reduction Co.*, 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756; ante, p. 119.

⁶² *Tempel v. Dodge*, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222.

⁶³ *Bergman v. Association*, 29 Minn. 275, 13 N. W. 120; *Kent v. Mining Co.*, 78 N. Y. 159, 179. Notice of the purpose must be given, if outside the usual business transacted at such meetings, as a change of the by-laws of vital importance. *Bagley v. Reno. Oil Co.*, 201 Pa. 78, 50 Atl. 760, 56 L. R. A. 184.

⁶⁴ *Trustees v. Flint*, 13 Metc. (Mass.) 539; *Reid v. Manufacturing Co.*, 40 Ga. 98, 2 Am. Rep. 563; *Duluth Club v. McDonald*, 74 Minn. 254, 76 N. W. 1128, 78 Am. St. Rep. 344.

⁶⁵ *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

it was held valid as to the limitation of time for suing, though void in so far as it affected the jurisdiction of courts.⁶⁶

Effect as to Stockholders.

Authorized by-laws, if regularly adopted, are binding upon all the stockholders, whether they have signed them, or otherwise expressly assented to them, or not. They are chargeable with notice of them.⁶⁷ And a stockholder is bound by by-laws adopted before he became a member, though he may not have had actual knowledge of them.⁶⁸ Of course, invalid by-laws do not bind him. Mere failure of a stockholder to object to by-laws that are void because unauthorized under any of the above rules, until an attempt is made to enforce them against him, does not estop him to object to them.⁶⁹

Effect as to Third Persons.

In so far as a by-law of a corporation is in the nature of a contract, the parties thereto are the corporation, upon the one side, and the individual members, upon the other. The right of any third person to establish a legal claim through a by-law depends upon whether he contracted with reference to it. If he did not, then it does not enter into his contract, and he cannot claim the benefit of it. Thus, where the members of a corporation signed a by-law by which they pledged themselves, in their individual as well as their collective capacity, for all moneys that might be loaned to the company, it was held that a person who loaned money to the company could not hold a member individually liable by virtue of the by-law, where there was no evidence that the loan was made on the credit of it.⁷⁰

Nor, on the other hand, can a by-law impose liabilities on third persons who contract with the corporation without reference to it, or deprive third persons of their legal rights against the corporation. Thus, a by-law of a bank cannot take away from a depositor the right to money deposited by him, but which, by mistake of the bank, was not credited to him.⁷¹ Nor can a corporation bind a bona fide purchaser of certificates of stock by a by-law, of which he has no notice, reserving a lien on the shares for an indebtedness due from the holder.⁷² Nor are persons dealing with an agent of a corporation bound by a

⁶⁶ *Amesbury v. Insurance Co.*, 6 Gray (Mass.) 596.

⁶⁷ *McFadden v. Board*, 74 Cal. 571, 16 Pac. 397; *Palmetto Lodge v. Hubbell*, 2 Strob. (S. C.) 457, 49 Am. Dec. 604; *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486.

⁶⁸ *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

⁶⁹ *Kolff v. Fuel Exchange*, 48 Minn. 215, 50 N. W. 1036.

⁷⁰ *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691.

⁷¹ *Mechanics' & Farmers' Bank v. Smith*, 19 Johns. (N. Y.) 115.

⁷² *Ante*, p. 444.

by-law limiting the apparent authority with which the corporation has clothed him.⁷³

If a person enters into a contract with a corporation, with notice of a by-law, and does not, by special contract, exclude it, the by-law forms a part of his contract.⁷⁴ Thus, where a person entered into the employ of a corporation at a yearly salary, without any special contract as to the term of service, and continued in its service with notice of a by-law providing that his office should be held at the pleasure of the board of directors, he was held bound thereby.⁷⁵ It is otherwise, however, where the by-law is excluded by the terms of the contract, as it would be, in the case mentioned, by a special contract for a certain term.⁷⁶

Repeal and Amendment of By-Laws.

A corporation generally has the power to repeal by-laws and enact new ones at pleasure,⁷⁷ but the power to alter by-laws has the same limits as the power to make them in the first instance. These limitations have just been pointed out. The power to make by-laws, as we have seen, is to make such only as are not inconsistent with the constitution of the corporation and the law. And a by-law cannot impair vested rights of a stockholder. So, alteration of a by-law is invalid if it contravenes these rules. Thus, where a by-law divided the stock of a corporation into equal shares, giving equal rights, and the stock was thus issued, a new by-law providing for the surrender of shares, and issue of preferred stock instead, on payment of a certain additional sum, was held void, as against dissenting stockholders, because it impaired their vested rights under the contract with the corporation under which they took their shares.⁷⁸

Though, as we have seen, the directors may, by a by-law, be given the power to enact and to alter and amend by-laws, they have no au-

⁷³ Rathbun v. Snow, 123 N. Y. 343, 35 N. E. 879, 10 L. R. A. 355; Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187.

⁷⁴ Barbot v. Mutual Reserve F. L. Ass'n, 100 Ga. 681, 28 S. E. 498; Hallenbeck v. Powers & Walker Casket Co., 117 Mich. 680, 76 N. W. 119.

⁷⁵ Douglass v. Insurance Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822. Cf. Fowler v. Great Southern Tel. & T. Co., 104 La. 751, 29 South. 271.

⁷⁶ Trustees of Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243; Martino v. Insurance Co., 47 N. Y. Super. Ct. 520.

⁷⁷ See Smith v. Nelson, 18 Vt. 511; Underhill v. Improvement Co., 93 Cal. 300, 28 Pac. 1049; Gold Bluff Min. & L. Corp. v. Whitlock, 75 Conn. 669, 55 Atl. 175.

⁷⁸ Kent v. Mining Co., 78 N. Y. 159, 182. See, also, Parish v. New York Produce Exchange, 69 N. Y. Supp. 764, 60 App. Div. 11, affirmed 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149.

thority, under such a power, to disregard or alter another by-law which was intended as a limitation on their powers.⁷⁹

A by-law may be modified by unanimous consent of stockholders to a regular course of dealing inconsistent with it.⁸⁰

Waiver of By-Law.

A by-law may not only be repealed, but it may be waived, by the corporation. If a course of action contrary to a by-law of a private corporation is acquiesced in by the shareholders, the by-law is thereby waived, and will not affect the rights of persons dealing with the corporation in good faith.⁸¹ This is true, even though they may be shareholders, if they did not have actual notice of the by-law.⁸² And acts of the directors in violation of the by-laws may be ratified by the shareholders, and generally by the same number of shareholders as would be necessary to enact them.⁸³ But the officers of a corporation cannot waive by-laws adopted by the stockholders for the protection of the corporation.⁸⁴

STOCKHOLDERS' MEETINGS.

182. A majority of the stockholders can bind the corporation only at a meeting regularly held and conducted. To constitute a legal meeting, so as to render the acts and vote of the majority binding:

- (a) **The meeting must be regularly called by one having authority. In the absence of provision to the contrary, such authority exists in the directors or managing agents.**
- (b) **Notice of the time and place of meeting must be given to each stockholder, unless the time and place are definitely fixed by statute, or by the charter or by-laws, or by usage. But if all the stockholders are present, in person or by proxy, want of notice is immaterial.**
- (c) **If the meeting is special, notice of the business to be transacted must be given. It is otherwise where the meeting is general; that is, for the transaction of any business within the powers of the corporation.**
- (d) **The meeting must be held at a reasonable time and place. It cannot be held out of the state, unless allowed by statute; but, in the absence of express prohibition, those who participate in such a meeting cannot question its legality.**

⁷⁹ Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

⁸⁰ Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

⁸¹ Clark v. Insurance Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44; Susquehanna Mut. Fire Ins. Co. v. Elkins, 124 Pa. 484, 17 Atl. 24, 10 Am. St. Rep. 608; Blair v. Metropolitan Sav. Bank, 27 Wash. 192, 67 Pac. 609.

⁸² Underhill v. Improvement Co., supra.

⁸³ Underhill v. Improvement Co., 93 Cal. 300, 28 Pac. 1049.

⁸⁴ Mulrey v. Insurance Co., 4 Allen (Mass.) 116, 81 Am. Dec. 689; Hale v. Insurance Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410.

- (e) The meeting must be regularly conducted.
 - (f) If a statute or the charter or by-law provides that a certain number of stockholders shall be necessary to constitute a quorum for the transaction of business, a less number cannot act, but may adjourn. In the absence of express provision, no particular number is necessary to constitute a quorum.
 - (g) The major part of the legal votes actually cast at a meeting constitutes a "majority," and prevails.
 - (h) A meeting and proceedings are not rendered illegal by the fact that one of the stockholders is non compos mentis, or otherwise under legal disability.
 - (i) Meetings are presumed to have been regular, and to have been legally conducted, unless the contrary appears.
183. An adjourned meeting is merely a continuation of the original meeting, without any loss or accumulation of powers.
184. A court of equity has jurisdiction to supervise and control an election, and appoint a master for that purpose, when necessary to procure a fair election.

In order that the acts of a majority of the stockholders may be binding on the corporation, they must be done at a meeting of the stockholders. It is only at a meeting duly held and regularly conducted that the stockholders represent the corporation.⁸⁵ Thus, the assent of a majority of the stockholders to the appointment of an agent to execute a mortgage on behalf of the corporation, if expressed elsewhere than at a meeting, as where the assent of each is given separately, and at different times, to a person who goes to them privately, is a nullity, and a mortgage given in pursuance thereof is void.⁸⁶

Calling Meetings.

It is generally expressly provided by the charter or by-laws who shall call stockholders' meetings, and no meeting can be legally called except in compliance therewith.⁸⁷ If the charter and by-laws are silent on the subject, a meeting may be called by the directors or the general agent to whom is intrusted the management and control of its affairs, whenever, in their opinion, the condition and affairs of the corporation are such as to render a meeting necessary.⁸⁸ If all the stockholders are present at a meeting, the fact that it was called by one not authorized will not render the proceedings invalid. If the proper officers refuse to perform their duty, positively imposed by

who doesn't
call
meeting

⁸⁵ *Duke v. Markham*, 105 N. C. 138, 10 S. E. 1003; *Peirce v. Building Co.*, 9 La. 397, 29 Am. Dec. 448; *Sayles v. Brown* (C. C.) 40 Fed. 8. But see *Woodbridge v. Pratt & W. Co.*, 69 Conn. 304, 37 Atl. 688.

⁸⁶ *Duke v. Markham*, supra.

⁸⁷ *Matthews v. Columbia Nat. Bank* (C. C.) 79 Fed. 558.

⁸⁸ *Stebbins v. Merritt*, 10 Cush. (Mass.) 27, 33.

law, to call a meeting of stockholders for an election of directors, a stockholder may compel such performance by mandamus.⁸⁸

Notice of Meeting.

It is essential to the validity of a stockholders' meeting, and of the acts and votes of the majority thereat, that due notice of the day, hour, and place of the meeting shall have been given personally to each stockholder, unless the stockholders were in fact all present, in person, or by proxy, or unless the time and place of the meeting were definitely fixed by statute, or by the charter or by-laws of the company, or by usage.⁸⁹ It is not enough to give notice of the day. The notice must also specify the hour.⁹¹ If the meeting is a stated one,—that is, if the time and place of holding the same are fixed by the charter or by-laws, or by the statute or usage,—no notice is required of the time and place of holding it.⁹² It is immaterial in what way the time and place of a general meeting are fixed. If they have been fixed by usage, a tacit understanding of the members, or in any other way, it is enough.⁹³ The fact that a by-law fixes the day and place for an annual meeting does not dispense with the necessity for notice, for the stockholders are entitled to notice of the hour.⁹⁴

If the meeting is a special one, notice must be given to each stockholder, not only of the time and place of meeting, but also of the business which will be transacted, and there will be no power to transact any other business.⁹⁵ But, if the meeting is a general one,—that is, for the transaction of all business within the powers of the corporation,—such notice is not necessary.⁹⁶ Stated meetings are to be regarded as general ones, unless restricted by statute or by the charter or by-laws.⁹⁷

If all the stockholders have been notified, and are present at the meeting, in person or by lawful proxy, and no objection is then made

⁸⁸ *People v. Cummings*, 72 N. Y. 433.

⁸⁹ *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99, and note; *Wiggin v. Elder*, etc., 8 Metc. (Mass.) 301; *San Buenaventura Commercial Min. & Manuf'g Co. v. Vassault*, 50 Cal. 534. See *State v. Bonnell*, 35 Ohio St. 10.

⁹¹ *San Buenaventura Commercial Min. & Manuf'g Co. v. Vassault*, 50 Cal. 534.

⁹² *Warner v. Mower*, 11 Vt. 385; *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252, 269. And see *State v. Bonnell*, 35 Ohio St. 10, 15.

⁹³ *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252, 269.

⁹⁴ *San Buenaventura Commercial Min. & Manuf'g Co. v. Vassault*, 50 Cal. 534.

⁹⁵ *Warner v. Mower*, 11 Vt. 385; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463; *Evans v. Heating Co.*, 157 Mass. 37, 31 N. E. 698; *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668, 39 Atl. 527.

⁹⁶ *Warner v. Mower*, 11 Vt. 385. See *People v. Batchelor*, 22 N. Y. 128, 131.

⁹⁷ *Warner v. Mower*, 11 Vt. 385.

to the regularity of the notification, all objections on that ground are waived.⁹⁸ Indeed, the presence of all the stockholders would obviate the objection that there was no notice.⁹⁹ Acts of the majority at a meeting that was irregular for want of notice may be ratified by the majority at a subsequent meeting that is regular.¹⁰⁰

Time and Place of Meeting.

Meetings cannot be held at an unreasonable or inconvenient time or place. If a particular time or place is fixed by the charter or by-laws, or by statute, the provisions must be observed. As a corporation has no legal existence beyond the limits of the state by which it was created,¹⁰¹ at common law the stockholders cannot hold a meeting, and do strictly corporate acts, outside the state. This proposition has been laid down broadly and without qualification. The leading case on this point is *Miller v. Ewer*.¹⁰² In this case, under a charter granted by the state of Maine, the corporators met in the state of New York, and there organized and accepted the charter, and elected officers and directors. The directors then met in the city of New York, and authorized the president and secretary to execute a mortgage on the corporate property, which was done accordingly. It was held that the action of the corporators in meeting and electing directors was a corporate act, and could not be performed outside of the state of Maine, that the directors were not legally chosen, and that the mortgage, therefore, was void. The corporators, it was said, as natural persons, have no power to bring the corporation, the artificial being, into life and active operation. "The charter confers upon them a new faculty for this purpose,—a faculty which they can have only by virtue of the law which confers it. That law is inoperative beyond the bounds of the legislative power by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty which confers it, and they cannot possess or exercise it there, [they] can have no more power there to make the artificial being act, than other persons not named or associated as corporators. Any attempt to exercise such a faculty there is merely a usurpation of authority by persons destitute of it, and acting without

⁹⁸ *Stebbins v. Merritt*, 10 Cush. (Mass.) 27, 34; *In re Griffing Iron Co.*, 63 N. J. Law, 168, 41 Atl. 931; *Columbia Nat. Bank v. Mathews*, 85 Fed. 934, 29 C. C. A. 491; *Synnott v. Cumberland Bldg. & L. Ass'n*, 117 Fed. 379, 54 C. C. A. 553; *Tompkins v. Sperry, Jones & Co.*, 98 Md. 560, 54 Atl. 254.

⁹⁹ See *People v. Peck*, 11 Wend. (N. Y.) 604, 611, 27 Am. Dec. 104.

¹⁰⁰ *Richardson v. Railroad Co.*, 44 Vt. 613; *Jones v. Turnpike Co.*, 7 Ind. 547.

¹⁰¹ Ante, p. 29.

¹⁰² *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619.

any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void." ¹⁰³

It will be noticed that in this case the corporators named in the charter met and organized outside the state granting the charter. They did not meet and organize in the state, and then hold a meeting outside the state for the election of the directors. The decision, therefore, might well have been based on the ground that the corporation had not been legally organized, leaving untouched the question whether the stockholders of a corporation which has been duly and legally organized within the state may hold meetings and transact corporate business in another state. And this view has been taken in Missouri. In *Ohio & M. R. Co. v. McPherson*,¹⁰⁴ the stockholders of an Illinois corporation, which had been duly organized in that state, held meetings and transacted corporate business in Missouri; and subscribers sought to defeat an action on their subscriptions on the ground that the calls for stock assessments were made in Missouri, and the votes and proceedings of the stockholders and directors in that state were void. It was held that the defense could not be sustained. "After the corporation had become full-fledged," it was said, "I see nothing in reason or principle why the stockholders could not as well elect directors, as the directors elect a treasurer, on the Missouri side of the line. The most that could be said, under such circumstances, is that the election was irregular. The corporation having once been put into existence, if the members of the board of directors, whether charter members, or their appointees, or those elected by the stockholders in St. Louis, accepted their office, and acted under their appointment or election, as the evidence shows was the case, they became de facto directors, and their authority to act on behalf of the corporation could not be questioned by the appellants, in this collateral suit, without showing a judgment of ouster against them in a direct proceeding by the government for that purpose." ¹⁰⁵

It has also been held by the supreme court of the United States that where a stockholders' meeting is held in a state other than that by which the corporation was created, and all the stockholders are present and take part, they and the corporation are estopped to ques-

¹⁰³ And see *Bellows v. Todd*, 39 Iowa, 209, 217; *Ormsby v. Mining Co.*, 56 N. Y. 623; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339; *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189.

¹⁰⁴ 35 Mo. 13, 86 Am. Dec. 128.

¹⁰⁵ And see *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, 714.

tion the validity of the proceedings.¹⁰⁶ Mr. Morawetz says that "there is no objection to a meeting held in a foreign jurisdiction, provided all the shareholders give their consent. And, in the absence of an express statutory prohibition, there appears to be no reason why the shareholders in an ordinary business corporation should not provide in their articles of association that meetings may be called at convenient places outside of the state under whose laws the company is formed."¹⁰⁷ In some states it is provided by statute that meetings of the stockholders shall be held within the state;¹⁰⁸ while in other states it is provided that meetings may be held outside the state.¹⁰⁹ A meeting in one of several states of the stockholders of a corporation chartered in all of those states is valid, in respect to the property of the corporation in all of the states, without the necessity of a repetition of the meeting in the other states.¹¹⁰

Conduct of the Meeting.

Of course, the meeting must be conducted regularly and fairly, and regulations contained in the charter or by-laws must be observed.¹¹¹ But it is not every slight and immaterial irregularity that will vitiate the proceedings. Thus, the fact that the inspectors at a stockholders' meeting are not sworn, or are not sworn in the proper manner, will not invalidate an election, if no objection is interposed at the time of the election. It is enough that they are duly appointed and enter on the discharge of their duties, and are therefore inspectors de facto.¹¹²

It is not necessary, in the absence of some express requirement, that the clerk, moderator, inspector, or chairman chosen to preside over a stockholders' meeting shall be a stockholder or member. He acts merely as an agent of the corporation, to preside and see that the proceedings are conducted in a legal and orderly manner; and there is nothing in the nature of the office which requires him to be

¹⁰⁶ *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Oumming, Cas. Priv. Corp. 855; *Heath v. Smelting Co.*, 39 Wis. 146.

¹⁰⁷ 1 Mor. Priv. Corp. § 488.

¹⁰⁸ In *Hodgson v. Railroad Co.*, 46 Minn. 454, 49 N. W. 197, it was held that a general stockholders' meeting for the election of officers held out of the state, all of the stockholders not consenting, and the by-laws providing that it shall be held at a specified place in the state, is illegal; and, as against the officers thus elected, those previously in office have the right to retain control of the affairs of the corporation. And see *Ormsby v. Mining Co.*, 56 N. Y. 623.

¹⁰⁹ See Beale, *Foreign Corp.* § 323.

¹¹⁰ *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196.

¹¹¹ See *Sayles v. Brown* (C. C.) 40 Fed. 8.

¹¹² In re Election of Directors of Mohawk & H. R. Co., 19 Wend. (N. Y.) 135; In re Election of Directors of Chenango County Mut. Ins. Co., Id. 635.

a member, although, from convenience, the usage is to select one of the members to perform the duty.¹¹³ Statutory or charter requirements, however, in this respect must be observed.¹¹⁴

"Quorum" and "Majority."

By the term "quorum" is meant the number of members of a corporation, board, committee, etc., who must be present in order to take action. Generally, by statute, or by particular charters or by-laws, persons owning a majority of the shares must be present or represented at a stockholders' meeting, to constitute a quorum, and, unless there is a quorum present, no action can be taken. Less than a quorum can do no more than adjourn. A majority of the legal votes actually cast, a quorum being present, will bind the corporation.

At common law no particular number of stockholders need be present, except that there must be at least two, for one person could not hold a meeting.¹¹⁵ If all the stockholders have been duly notified, or if the meeting is a stated one, those who assemble, though they represent less than a majority of the shares, constitute a quorum, and may act, unless there is express provision to the contrary, and a majority of these, however few, may bind the corporation. At common law, therefore, the "majority of the stockholders," as the term is used in reference to its power to bind the corporation, does not necessarily mean persons representing a majority of the shares, or a majority of persons owning shares. It means, in the absence of a provision to the contrary, the major part of those who are present at a regular corporate meeting. "There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act, but in the former a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject, and, if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation."¹¹⁶

At a valid stockholders' meeting, the charter and by-laws being si-

¹¹³ *Stebbins v. Merritt*, 10 Cush. (Mass.) 27, 34.

¹¹⁴ See *People v. Peck*, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

¹¹⁵ *Sharpe v. Dawes*, 41 L. J. Q. B. 104. But see *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

¹¹⁶ 2 Kent, Comm. 293; 1 Kyd, Corp. 401; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402, 410, 17 Am. Dec. 525; *Field v. Field*, 9 Wend. (N. Y.) 394, 403; *Gilchrist v. Collopy*, 82 S. W. 1018, 26 Ky. Law Rep. 1003. Cf. *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007. In counting a quorum, shares authorized, but not issued or subscribed for, are not to be included. *Castner v. Twitchell-Champlin Co.*, 91 Me. 524, 40 Atl. 558.

lent on the subject, a majority of the votes cast, though but a minority of the stock represented, prevails. Those having an opportunity to vote, and not voting, are held to acquiesce in the result of the votes actually cast. Therefore, if some of the members become dissatisfied, and fail or refuse to vote, a majority of the legal votes actually cast, though less than a majority of all the votes represented at the meeting, will elect.¹¹⁷

Disability of Individual Stockholders.

If all of the stockholders are present, or have been duly notified, the meetings and proceedings are not rendered illegal by the fact that one of them is non compos mentis, or otherwise under legal disability. The law does not look into the capacity of the stockholders to transact business, but only regards the capacity of the aggregate body when duly assembled. "If it were otherwise," said Bigelow, J., "the legal incapacity of a stockholder, such as coverture, infancy, or insanity, would operate as an effectual obstacle to a valid assembly of any aggregate corporation. The law confers the attribute of individuality on the entire body constituting a corporation, and in which the individuals composing it are merged. When duly assembled, the corporation itself becomes the individual or person whose acts and proceedings the law can alone regard. If, therefore, it is legally called together, the law presumes that the individual members are competent to the transaction of business."¹¹⁸

Record and Proof of Action.

In the absence of express requirement to the contrary in the charter or by-laws, the resolutions adopted at a stockholders' meeting need not be recorded in the books of the corporation. In the absence of a record of the proceedings, they may be proved by parol evidence.¹¹⁹ If the record is incorrect, the stockholder's remedy is by proceedings to correct it.¹²⁰

¹¹⁷ First Parish in Sudbury v. Stearns, 21 Pick. (Mass.) 148; State v. Chute, 34 Minn. 135, 24 N. W. 353. And see Darrin v. Hoff, 99 Md. 491, 58 Atl. 196. See, contra, Com. v. Wickersham, 66 Pa. 134. In this case, at a convention of school directors, 112 were present. Of these, 56 voted for one candidate for superintendent, while 55 voted for another, and one refused to vote at all. It was held that the former did not have a majority of the directors present, as the director not voting was entitled to be counted as present, and was not to be considered as absent, and the legal intentment was that he voted for neither or for the minority candidate.

¹¹⁸ Stebbins v. Merritt, 10 Cush. (Mass.) 27, 33.

¹¹⁹ Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855.

¹²⁰ Dennis v. Joslin Mfg. Co., 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 80.

Cure of Irregularity by Ratification.

If a stockholders' meeting is irregularly called or conducted, the irregularity may generally be waived by the stockholders. They may ratify acts of the majority which are not binding because of irregularities, and thereby render them binding.¹²¹

Presumption of Regularity.

Every reasonable intendment is to be made in favor of the regularity of stockholders' meetings, and the burden is upon one who claims that they were invalid to show the circumstances rendering them so. In the absence of evidence to the contrary, their legality will be presumed. "The maxim of law in such cases is, 'Omnia rite acta presumuntur.'"¹²² Thus, it has been held that, in the absence of evidence to the contrary, it will be presumed that due notice was given to all the stockholders.¹²³ So, where the by-laws of a corporation required the meetings to be held at the counting room of the company, and it appeared from the records that a meeting was held at the dwelling house of the general agent, without stating that it was at the counting room, it was presumed that the counting room was, for the time being, at such place.¹²⁴ So, it will be presumed that a quorum of members was present, unless the contrary clearly appears.¹²⁵

Adjourned Meetings.

A corporation may transact any business at an adjourned meeting that could have been transacted at the original meeting, for it is but a continuation of the same meeting. Whether the meeting is continued without interruption for many days, or by adjournment from day to day, or from time to time, many days intervening, it must be considered the same meeting, without any loss or accumulation of powers.¹²⁶ After a meeting has been regularly convened, it can be adjourned only by the act of the meeting itself, and the act of an officer serving as chairman in declaring it adjourned is a nullity.¹²⁷

Equity Jurisdiction.

A court of equity has jurisdiction to supervise and control an election of directors, and to appoint a master for that purpose, when it

¹²¹ Richardson v. Railroad Co., 44 Vt. 613; Jones v. Turnpike Co., 7 Ind. 547.

¹²² Citizens' Mut. Fire Ins. Co. v. Sortwell, 8 Allen (Mass.) 217.

¹²³ Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

¹²⁴ McDaniels v. Manufacturing Co., 22 Vt. 274.

¹²⁵ Citizens' Mut. Fire Ins. Co. v. Sortwell, 8 Allen (Mass.) 217.

¹²⁶ Warner v. Mower, 11 Vt. 385; Smith v. Law, 21 N. Y. 296. And see Schoff v. Town of Bloomfield, 8 Vt. 472; State v. Cronan, 23 Nev. 437, 49 Pac. 41.

¹²⁷ Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17. But see Haskell v. Read, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007.

appears that through fraud, violence, or other unlawful conduct on the part of a portion of the corporators, a fair and honest election cannot be held without the court's interposition.¹²⁸

It has been held that, if an election is held illegally, a court of equity has jurisdiction to set it aside at the suit of a dissenting stockholder.¹²⁹ But, by the better opinion, some other ground for equitable relief must exist, for otherwise the remedy at law by quo warranto would be adequate. A court of equity will not primarily take jurisdiction to determine the legality of an election of directors, or to remove a director who is in possession of the office. It will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and when the grant of the relief depends upon its decision.¹³⁰

SAME—VOTING.

185. Unless the right is taken away by express charter or statutory provision, or by the agreement under which shares were acquired, every stockholder is entitled to vote at corporate meetings; and he cannot be deprived of the right by by-laws enacted after his shares were acquired. The following rules may be particularly mentioned:

- (a) Ordinarily the holder of the legal title on the books of the corporation is entitled to vote.
- (b) The pledgor of shares, if he retains the title, is entitled to vote.
- (c) A trustee who holds the legal title, and not the cestui que trust, is entitled to vote.
- (d) Stock held by the corporation itself cannot be voted.
- (e) Shares held by two or more jointly, either in their own right, or as executors, trustees, etc., cannot be voted unless all agree upon the vote.
- (f) The right may be restricted by statute, and the statute cannot be evaded by transfer of the bare legal title.
- (g) Personal interest in a measure does not disqualify a stockholder from voting.

186. NUMBER OF VOTES—At common law each shareholder had only one vote, without regard to the number of shares owned by him. But now, generally by charter or statutory provision, and perhaps by custom, there is a right to one vote for each

¹²⁸ *Tunis v. Railroad Co.*, 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 665; *Bartlett v. Gates* (C. C.) 118 Fed. 66. Cf. *Yetter v. Delaware Valley R. Co.*, 206 Pa. 485, 56 Atl. 57.

¹²⁹ *Wright v. Water Co.*, 67 Cal. 532, 8 Pac. 70. And see *Stratford v. Malory*, 70 N. J. Law, 294, 58 Atl. 347.

¹³⁰ *Perry v. Oil-Mill Co.*, 93 Ala. 364, 9 South. 217; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. 747; *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007; post, p. 521.

share. Sometimes, by statute, a single stockholder is restricted as to the number of votes, and he cannot evade the statute by a colorable transfer.

Am. & G. 463 187. CUMULATIVE VOTING—Cumulative voting is allowed in some states by statute, but the right does not exist at common law.

188. PROXY—At common law the right to vote can only be exercised in person; but the right to vote by proxy—that is, by another under a power of attorney—is generally given by statute, or by the charter or by-laws. In regard to proxies, the following points may be particularly mentioned:

- (a) A proxy can only be given by the legal owner of stock at the time the vote is cast.
- (b) A proxy, though in terms irrevocable, may nevertheless be revoked, if not coupled with an interest. Some courts hold such a proxy void as against public policy.

Who Entitled to Vote.

Every stockholder has, as incident to his ownership of stock, a right to vote at stockholders' meetings, unless he is prohibited from doing so by some express charter or statutory provision, or by the agreement under which he holds his shares.¹⁸¹ He cannot be deprived of this right by a by-law, unless such a by-law is expressly authorized in advance, or where it was enacted before he acquired his shares.¹⁸² But there is nothing to prevent a corporation, on issuing stock, common or preferred, after its organization, from stipulating that the holders shall not have or exercise the right to vote the same.¹⁸³ It is frequently provided that to entitle a stockholder to vote the transfer must have been entered on the books within a certain number of days before the meeting.¹⁸⁴

The general rule is that the holder of the legal title to shares is entitled to vote them. And, in case of a dispute as to the right to vote at a stockholders' meeting, the books of the corporation are prima facie evidence as to who possesses that right.¹⁸⁵ The inspectors of election are not to inquire beyond the transfer book. Any private agreement or understanding between the individual holding the legal

¹⁸¹ Talbot J. Taylor & Co. v. Southern Pac. Co. (C. C.) 122 Fed. 147; Lord v. Equitable Life Assur. Co., 47 Misc. Rep. 187, 94 N. Y. Supp. 65.

¹⁸² Ante, p. 442, note 42.

¹⁸³ Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496.

¹⁸⁴ In re Glen Salt Co., 17 App. Div. 234, 45 N. Y. Supp. 568, affirmed 153 N. Y. 688, 48 N. E. 1104.

¹⁸⁵ Hoppin v. Buffum, 9 R. I. 513, 518, 11 Am. Rep. 291; Com. v. Dalzell, 152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640; Pender v. Lushington, 6 Ch. Div. 70. Where stock is transferable only on the books of the corporation, the books are conclusive as to who is entitled to vote stock legally issued. Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

title to the stock in due form and others is a matter between themselves, with which the corporation has no concern.¹³⁶

Same—Pledgor and Pledgee.

A person who pledges his stock is entitled to vote upon it until the title of the pledgee to the stock is perfected.¹³⁷ And it has been held that, if the stock stands on the books of the corporation in the name of the pledgee, the pledgor may, by suit in equity, compel a transfer to him, or oblige the pledgee to give him a proxy to vote.¹³⁸ But if the pledgor acquiesces in the control of the stock by the pledgee, who appears as the record owner, and makes no effort to inform the corporation of his ownership until a contested election occurs, and then not until the votes have been, or are being, counted, it will be too late to ask a court of equity to interfere with the declared result of the election.¹³⁹ So long as the stock stands on the books of the corporation in the name of the pledgee, without any reservation to the pledgor of the right to vote the same, the pledgee is entitled to vote.¹⁴⁰

Same—Trustees, etc.

One in whose name stock stands on the books of the corporation as trustee is entitled to vote upon it, unless the cestui que trust seasonably asserts his right to have it transferred to him.¹⁴¹ An admin-

¹³⁶ In re Long Island R. Co., 19 Wend. (N. Y.) 37, 44, 32 Am. Dec. 429.

¹³⁷ McDaniels v. Manufacturing Co., 22 Vt. 274; President, etc., of Merchants' Bank v. Cook, 4 Pick. (Mass.) 405; In re Barker, 6 Wend. (N. Y.) 509; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; Haskell v. Read, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007.

¹³⁸ Vowell v. Thompson, 3 Cranch, C. C. 428, Fed. Cas. No. 17,023; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291.

¹³⁹ Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291.

¹⁴⁰ See Com. v. Dalzell, 152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640; J. H. Wentworth Co. v. French, 176 Mass. 442, 57 N. E. 789.

¹⁴¹ Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; In re Barker, 6 Wend. (N. Y.) 509; Com. v. Dalzell, 152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640. And see Wilson v. Proprietors Central Bridge, 9 R. I. 590; National Bank v. Allen, 90 Fed. 545, 33 C. C. A. 169. Under Civ. Code, § 307, providing that every stockholder shall have the right to vote the number of shares standing in his name, "as provided in section 312," and section 312, providing that, to entitle a person to vote, he must be "a bona fide stockholder, having stock in his own name on the stock books at least ten days prior to the election," one is not entitled to vote stock in which he has never had any interest, but which is registered in his name for the purpose of enabling the real owner to avoid statutory liabilities; he not being a bona fide stockholder. Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119. Where a railroad company deposits with a trustee, under a written agreement, stock of another railroad company, reserving to itself all the rights, powers, and privileges appertaining to the ownership of the stock, including the right to vote it, the railroad company can exact from

istrator or executor may vote on the stock of the decedent, although the stock has not been transferred to him on the books.¹⁴²

Same—Shares Held by the Corporation.

A corporation cannot hold its own stock so as to entitle its directors or trustees to vote upon it.¹⁴³ Nor can persons who hold stock in trust for the benefit of the corporation vote thereon. The right to vote the stock is suspended while it is so held.¹⁴⁴ As a rule a corporation which has purchased shares in another corporation may not vote upon them.¹⁴⁵

Same—Shares Owned Jointly.

Since the right of voting upon stock is in the legal owner, it follows that stock held jointly by two or more persons, either in their own right, or as executors, trustees, etc., cannot be voted at all, unless all agree upon the vote.¹⁴⁶

Same—Restrictions in Charter or Statute.

The right to vote may be restricted by the charter or by statute. Sometimes it is expressly provided, for instance, that nonresident stockholders of particular corporations shall not be allowed to vote at meetings of the corporation. The object of such a provision is to prevent corporations from being controlled by nonresidents.¹⁴⁷ And often the number of votes which a single stockholder shall be allowed to cast is limited. The object is to prevent the corporation from getting into the control of a single person.¹⁴⁸

Same—Evasion of Statutory or Charter Prohibition.

Where, by statute or by the charter, particular stockholders are prohibited from voting, the prohibition cannot be evaded by transferring the stock to others merely for the purpose of enabling them to vote upon it. Thus, where the charter of a corporation provided

the trustee a proxy in order to vote the stock for a merger of the railroad company, whose stock is deposited with another company, as authorized by law, though the trustee will be compelled to receive back, instead of the stock of the original company, stock in the consolidated company. *Pennsylvania R. Co. v. Pennsylvania Co. for Ins., etc.*, 205 Pa. 219, 54 Atl. 783.

¹⁴² *Schmidt v. Mitchell*, 41 S. W. 929, 19 Ky. Law Rep. 763.

¹⁴³ *Ex parte Holmes*, 5 Cow. (N. Y.) 426. And see *Vall v. Hamilton*, 85 N. Y. 453.

¹⁴⁴ *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377. And see *State v. Smith*, 48 Vt. 266.

¹⁴⁵ *Parsons v. Tacoma Smelting & R. Co.*, 25 Wash. 492, 65 Pac. 765. See, also, *O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321.

¹⁴⁶ *Tunis v. Railroad Co.*, 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 665. And see *Villamil v. Hirsch (C. C.)* 138 Fed. 690. Cf. *Schmidt v. Mitchell*, 41 S. W. 929, 19 Ky. Law Rep. 763.

¹⁴⁷ *State v. Hunton*, 28 Vt. 594.

¹⁴⁸ *Mack v. Iron Co.*, 90 Ala. 396, 8 South. 150, 9 L. R. A. 650.

that no stockholder should be entitled to cast more than one-fourth of all the votes at an election of directors, it was held that a stockholder who owned more than one-fourth of the shares could not gratuitously transfer part of the stock for the purpose of enabling the transferees to vote it, and such transferees were enjoined from voting at the suit of another stockholder.¹⁴⁹ So, where nonresident stockholders in banking corporations were prohibited from voting, it was held that the prohibition could not be evaded by gratuitously transferring stock to residents for the purpose of enabling them to vote upon it. "The law," it was said, "is not to be outwitted by cunning devices."¹⁵⁰

Same—Personal Interest of Stockholder.

The fact that a stockholder has a personal interest in a matter coming before a stockholders' meeting, different from that of the other stockholders, does not disqualify him from voting. "A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure, even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others."¹⁵¹ In *Beatty v. Northwestern Transp. Co.*,¹⁵² one of the directors in a corporation contracted with his colleagues to sell to the company a vessel which he owned, at a certain price. The contract, though fair, was voidable,

¹⁴⁹ *Mack v. Iron Co.*, 90 Ala. 396, 8 South. 150, 9 L. R. A. 650; *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; *Webb v. Ridgely*, 38 Md. 364. See, also, *Bartlett v. Fourton*, 115 La. 26, 38 South. 882. Contra, *Pender v. Lushington*, L. R. 6 Ch. Div. 70.

¹⁵⁰ *State v. Hunton*, 28 Vt. 594. See, also, *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119.

¹⁵¹ *Gamble v. Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Beatty v. Northwest Transp. Co.*, 12 App. Cas. 589; *Bjorngaard v. Bank*, 49 Minn. 483, 52 N. W. 48; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Socorro Mountain Min. Co. v. Preston*, 17 Misc. Rep. 220, 40 N. Y. Supp. 1040; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 33 C. C. A. 517; *Windmuller v. Standard Distilling & D. Co. (C. C.)* 114 Fed. 491; *Burland v. Earle* [1902] App. Cas. 83; *Blinn v. Riggs*, 110 Ill. App. 37, affirmed 208 Ill. 473, 70 N. E. 704; 100 Am. St. Rep. 234; *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889. Owners of shares are under no disability to vote because they are also directors. *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1.

¹⁵² 12 App. Cas. 589. A person who, though not an agent or director, by his position as a large stockholder exercised a controlling influence on the company, must show that transactions between himself and it, by which he profited, are fair. *Russell v. Rock Run Fuel Co.*, 184 Pa. 102, 39 Atl. 21. And see *Crichton v. Webb Press Co.*, 113 La. 167, 36 South. 926, 67 L. R. A. 76, 104 Am. St. Rep. 500.

but it was subject to ratification by the stockholders; and it was held that the vendor director had a right, at a meeting of the stockholders, to vote in favor of ratifying the contract and concluding the purchase, and that his conduct was not to be regarded as oppressive towards the minority of shareholders because he individually owned a majority of the stock.

As we have seen in a preceding section, if a majority of the stockholders attempt to manage the affairs of the corporation, not only in their own interest, but in violation of the charter, or in fraud of the rights of the minority, a court of equity will interfere, in a proper case, at the suit of an injured stockholder.¹⁵³

Number of Votes.

In *Taylor v. Griswold*,¹⁵⁴ it was held that at common law each stockholder of a corporation has but one vote, without regard to the number of shares owned by him, and a by-law allowing one vote for each share was held void. It is generally provided, however, by the charter of joint-stock corporations, or by statute, that stockholders shall have a vote for each share; and this is clearly the just rule, for "stockholders are interested, not equally, but in proportion to the number of shares held by them."¹⁵⁵ Indeed, it has been said that the custom of giving the shareholders in joint-stock corporations a vote for each share has become so well established that an intention to follow the custom may be implied, in the absence of any indication to the contrary.¹⁵⁶ And it has been held, contrary to the decision in *Taylor v. Griswold*, that a by-law giving a vote for each share is valid and binding on all the stockholders.¹⁵⁷ As we have seen, to prevent the corporation from getting into the control of a single person the number of votes which a single stockholder shall be allowed to cast is limited by statute, and the limitation cannot be evaded by transferring the shares to enable the transferees to vote upon them.¹⁵⁸

Cumulative Voting.

In some states, in order to allow the minority of the stockholders to secure representation on the board of directors, there are statutory or constitutional provisions allowing cumulative voting. Thus, it is provided in West Virginia that, in all elections for directors or managers of corporations, every stockholder shall have the right to vote

¹⁵³ Ante, p. 375,

¹⁵⁴ 14 N. J. Law, 222, 27 Am. Dec. 33.

¹⁵⁵ 1 Cook, Stock, Stockh. & Corp. Law, § 609.

¹⁵⁶ 1 Mor. Priv. Corp. § 476.

¹⁵⁷ *Com. v. Hemmingway*, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

¹⁵⁸ Ante, p. 460.

Cumulative voting
 a owns 100 shares - 5 directors are to be voted for -
 a may vote 500 shares for director B, or
 " " " 100 " " " " B - C - D - E - F or -
 " " " 300 " " " " B - and
 " " " 50 " each " " C - D - E - F etc.

for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit.¹⁵⁹ The right to cumulative voting does not exist unless expressly given by statute.¹⁶⁰

It has been held that, where the legislature has reserved the right to amend or repeal the charter of a corporation, it may pass an act allowing cumulative voting.¹⁶¹ If no such power has been reserved, such a statute, as applied to existing corporations, would be unconstitutional, as impairing the contractual rights of the stockholders.¹⁶²

Votes by Proxy.

The right to vote by proxy must be expressly given, either by a statute or by the charter or by-laws of the corporation, or it does not exist. The common law requires all votes to be given in person.¹⁶³ It has been held that, since the common law requires this, a by-law giving the right to vote by proxy is repugnant to law, and therefore void, unless such a by-law is authorized by the charter.¹⁶⁴ By the weight of authority, however, a corporation has the implied power to enact such a by-law.¹⁶⁵ To authorize a vote by proxy, the case must

¹⁵⁹ See *Cross v. Railway Co.*, 35 W. Va. 174, 12 S. E. 1071. And see *Wright v. Water Co.*, 67 Cal. 532, 8 Pac. 70; *Horton v. Wilder*, 48 Kan. 222, 29 Pac. 568; *Weinburgh v. Union Street Ry. A. Co.*, 55 N. J. Eq. 640, 37 Atl. 1026; *Boggiano v. Chicago Macaroni Mfg. Co.*, 99 Ill. App. 509; *Com. v. Flannery*, 203 Pa. 28, 52 Atl. 129. Where the right is given, it is no objection to the validity of an election that the stockholders did not vote cumulatively; it not appearing that any stockholder claimed the right. *Schmidt v. Mitchell*, 41 S. W. 929, 19 Ky. Law Rep. 763.

¹⁶⁰ *State v. Stockley*, 45 Ohio St. 304, 13 N. E. 279. In this case it was held that a statute providing that the directors of corporations "shall be chosen by ballot, by the stockholders who attend for that purpose, either in person, or by lawful proxies; each share shall entitle the owner to as many votes as there are directors to be elected, and a plurality of votes shall be necessary for a choice,"—did not give the right of cumulative voting. Cf. *Schwartz v. State*, 61 Ohio St. 497, 56 N. E. 201.

¹⁶¹ *Cross v. Railway Co.*, 35 W. Va. 174, 12 S. E. 1071; *Attorney General v. Looker*, 111 Mich. 498, 69 N. W. 929; ante, p. 217.

¹⁶² Ante, pp. 208, 434; *State v. Greer*, 78 Mo. 188.

¹⁶³ *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 83; *Com. v. Bringhurst*, 103 Pa. 134, 49 Am. Rep. 119; *Phillips v. Wickham*, 1 Paige (N. Y.) 590; *People v. Twaddell*, 18 Hun (N. Y.) 427; *McKee v. Home Sav. & T. Co.*, 122 Iowa, 731, 98 N. W. 609.

¹⁶⁴ *Taylor v. Griswold*, supra.

¹⁶⁵ *Com. v. Detwiller*, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360; *State v. Tudor*, 5 Day (Conn.) 329, 5 Am. Dec. 162; *People v. Crossley*, 69 Ill. 195; *Walker v. Johnson*, 17 App. D. C. 144.

be brought within the terms of the statute, charter, or by-law. Thus, where an act of incorporation provided that each stockholder personally present should be allowed to vote on the stock standing in his name, and that each stockholder, "being a citizen of the United States," might vote by proxy, it was held that an alien stockholder could not vote by proxy.¹⁶⁶

A proxy to vote stock can only be given by the legal owner of the stock at the time the vote is to be cast. "The right of voting stock is inseparable from the right of ownership. The one follows as a sequence from the other, and the right to vote cannot be separated from the ownership without the consent of the legal owner."¹⁶⁷ It follows that a proxy is revoked by a sale of the stock,¹⁶⁸ and where the owner of stock dies a proxy to vote thereon can only be given by his executors. It cannot be given by the will; nor can a provision in the will that the executors shall give a proxy to a certain person entitle such person to vote the stock, if the executors refuse to give the proxy, for on the death of the owner of stock his ownership ceases, and the executors become the owners.¹⁶⁹ A power of attorney or proxy to vote stock, though in terms irrevocable, may nevertheless be revoked at any time before the vote, if it is not coupled with an interest.¹⁷⁰

A proxy or power of attorney to vote stock must, of course, be sufficient to show the inspectors that the agent is acting by the authority of the principal, but no peculiar formality is required. It is sufficient if it appears on its face to confer the requisite authority, and is free from all reasonable grounds of suspicion of its genuineness and authenticity.¹⁷¹

Voting Trusts and Pooling Agreements.

How far it is possible to tie up a majority of the stock of a corporation by a surrender on the part of stockholders of the voting power, so that the control may be secured for the support of a continuous policy of management, is a question on which the authorities are not in agreement. Such a result has been sought to be attained in various ways, sometimes by an agreement between stockholders to vote together, sometimes by an agreement by which proxies are given to trustees with power to vote as they may be directed or may determine, sometimes by an agreement by which the stock is transferred to trustees

¹⁶⁶ In re Barker, 6 Wend. (N. Y.) 509.

¹⁶⁷ Tunis v. Railroad Co., 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 665.

¹⁶⁸ Ryan v. Seaboard & R. R. Co. (C. C.) 89 Fed. 397.

¹⁶⁹ Id.

¹⁷⁰ Woodruff v. Railroad Co. (C. C.) 30 Fed. 91; Schmidt v. Mitchell, 41 S. W. 929, 19 Ky. Law Rep. 763; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

¹⁷¹ In re St. Lawrence Steamboat Co., 44 N. J. Law, 529.

with power to vote.¹⁷² Some courts have held or declared broadly that the power to vote is inseparable from the beneficial ownership of the stock, and that all such agreements or devices by which the stockholders combine to place the voting power of their shares in others are illegal, upon the ground that each stockholder is entitled to the free exercise of the judgment of the other stockholders and that each must be free to cast his vote for what he deems the best interest of the corporation.¹⁷³ Other courts have sustained such agreements in one form or another.¹⁷⁴

It is generally held that stockholders may lawfully combine to control the management of the corporation, and that an agreement to vote as a unit for such policy as the majority of them may determine is not illegal, but that such agreement is revocable.¹⁷⁵ Thus where several purchasers of stock agreed that they would for five years retain the power to vote in one body, the vote to be determined by ballot between them, the agreement was sustained.¹⁷⁶ But a contract in regard to elections, which provides that a lucrative position shall be given to a party to the contract, is illegal.¹⁷⁷

¹⁷² For a full discussion, see *Cook, Corp.* § 622 et seq.; 10 Cyc. 341 et seq.

¹⁷³ *Harvey v. Linville Imp. Co.*, 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749. See, also, *Griffith v. Jewett*, 15 Wkly Law Bul. 419; *Moses v. Scott*, 84 Ala. 608, 4 South. 742; *Gage v. Fisher*, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; *Kreissl v. Distilling Co.*, 61 N. J. Eq. 5, 47 Atl. 471; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Bostwick v. Chapman* (*Shepaug Voting Trust Cases*), 60 Conn. 553, 24 Atl. 32. In *Shepaug Voting Trust Cases*, supra, a syndicate owning a majority of the stock of a railroad company had the title put in a trust company to vote for five years according to the direction of a committee, who had no title to the stock. The agreement secured a secret personal advantage to the members of the syndicate, and was illegal on that ground. In *Fisher v. Bush*, 35 Hun (N. Y.) 641, it was held that an agreement among stockholders not to give proxies was contrary to public policy.

¹⁷⁴ *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 South. 723; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809. And see *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; Cf. *Warren v. Pim*, supra.

¹⁷⁵ *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24. And see *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, 45 N. Y. Super. Ct. 464, affirmed 86 N. Y. 618; *Beitman v. Steiner*, 98 Ala. 241, 13 South. 87; *Sullivan v. Parkes*, 69 App. Div. 221, 74 N. Y. Supp. 787.

¹⁷⁶ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119. In this case the agreement was held irrevocable. And see *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

¹⁷⁷ *Guernsey v. Cook*, 120 Mass. 501; *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; *Gage v. Fisher*, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; *Snow v. Church*, 13 App. Div. 108, 42 N. Y. Supp. 1072; *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795.

A contract between stockholders, whereby they give proxies to trustees with power to vote as they shall determine, without transfer of the shares, is not illegal; but the proxies, although irrevocable in terms, are nevertheless generally held to be revocable.¹⁷⁸ It has been held, however, in Alabama, that where, in order to prevent foreclosure of a railroad, the creditors and stockholders entered into an agreement by which the claims of the creditors were transferred to trustees, in whom, by irrevocable power of attorney, the right to vote the stock was vested until the debts should be paid, the power was not subject to revocation.¹⁷⁹

In Massachusetts a contract between stockholders whereby they transfer their stock to trustees and invest them with power to vote upon it on such terms as they may determine has been declared to be legal, and it was said that if the trust was an active one it could not be terminated at will, and that it might be held that the duty of voting incident to the legal title made such trust an active one.¹⁸⁰ In

¹⁷⁸ *Brown v. Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025. And see *Vanderbilt v. Bennett*, 6 Pa. Co. Ct. R. 193; *Woodruff v. Railroad Co.* (O. C.) 30 Fed. 91; *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345. Such an agreement was held unlawful in *Bostwick v. Chapman* (Shepaug Voting Trust Cases), *supra*.

¹⁷⁹ *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 South. 723. The court said: "We have examined case after case, and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not sanction if the principal had voted, and not a proxy; and, in case of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form irrevocable. The doctrine as to dry trust does not arise in this case. * * * If there were no precedents, upon principle, we would hold that, in determining the validity of an agreement which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties. Neither will it annul them, except to preserve its own majesty, and to conserve the greater interest of the public."

¹⁸⁰ *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809. In this case it was held that an agreement to form a syndicate to gain control of a company and advantage to the members, the members subscribing for a certain number of shares of stock at a stated price, and agreeing, after the purchase of the stock, to enter into a pooling contract, whereby all syndicate stock shall be voted by a committee of five of the subscribers "at each annual meeting for a period of not less than three years for such board of directors as shall be named," with power reserved to fill vacancies on the committee, is not illegal as an attempt on the part of the stockholders to deprive themselves of their deliberative powers and duties as stockholders; it being possible that the committee contemplated should act as trustees for the stockholders, and it

view of the necessity of a consistent policy and a stable management for large corporations, especially where money must be provided for a reorganization, it is difficult to see why a voting trust, if formed in good faith and for the promotion of the interests of the corporation, should be regarded as opposed to public policy.¹⁸¹ In several decisions, however, they have been condemned upon this ground.¹⁸²

not appearing that the "gain and advantage" mentioned was to be at the expense of the corporation, or intended to work a wrong to the other stockholders. Holmes, C. J., said: "Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term certainly is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one, he cannot terminate it at will; and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff.

* * * It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other states show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together." See, also, *Chapman v. Bates*, 61 N. J. Eq. 638, 47 Atl. 638, 88 Am. St. Rep. 459. But see *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773.

¹⁸¹ In New York voting trusts are authorized, subject to restrictions, by statute. Laws 1901, p. 975, c. 355.

¹⁸² *Harvey v. Linville Imp. Co.*, supra; *Bostwick v. Chapman* (Shepaug Voting Trust Cases), supra. And see *Warren v. Pim*, supra, in which seven members of the court held the voting trust to be contrary to public policy, and six dissented. Swayze, J., dissenting, said: "If the only object to the voting trust is to secure permanency of management, with a view to what the stockholders honestly consider to be the best interests of the corporation, I see no objection to the adoption of any necessary means authorized by the statute to secure that end. When it is said that the stockholder of a corporation is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation, it cannot be meant that he is entitled to hamper in any way the free and honest exercise of his fellow stockholders' judgment. He may on each occasion act as he chooses, and, as Chief Justice Holmes intimated in *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 810, the question is whether it is unlawful to contract to do what it is perfectly lawful to do. The legality of the purpose must depend upon the good faith of the stockholder, and upon whether his purpose is the general welfare of the corporation. If it is, I cannot believe that purpose is made illegal merely because he may think that the general welfare of the corporation will be promoted by securing permanency of management for a long series of years. The fact that the voting power is surrendered for a long series of years may be an important, or even a controlling, fact in determining the question of good faith of the stockholder.

Effect of Illegal Reception or Rejection of Votes.

When illegal votes are offered, objection must be raised at the time. If they are not challenged, their receipt will afford no ground for setting the election aside.¹⁸³

Before a stockholder can complain that his vote was not taken at a stockholders' meeting, he must show that he offered to vote, or that he properly presented his claim of right to vote, and that it was excluded.¹⁸⁴ If the charter and by-laws prescribe no different rule, and the meeting appoints no tellers or inspectors for the purpose, it is for the meeting to determine, in the first instance, the right to vote. The president of the corporation or chairman of the meeting has no right to pass upon it. And one who, upon an adverse opinion expressed by that officer, refrains from offering his vote, and does not present his claim of right to the meeting for it to pass upon, cannot be heard afterwards to complain.¹⁸⁵

It is not a valid objection to an election that illegal votes were received, or legal votes rejected, unless the majority is thereby changed.¹⁸⁶ And, to set aside an election on such a ground, it must be made to appear affirmatively that the majority is changed. Such a result will not be presumed.¹⁸⁷

A case may readily be conceived where such action would indicate bad faith, and a desire to secure an advantage of a fellow stockholder, rather than the good of the corporation. But can it be contended that, if a corporation finds it necessary to borrow money upon bonds issued for a long term of years, the stockholders cannot, consistently with public policy, in order to secure the loan, vest the management of the corporation in hands satisfactory to the lenders and for a term commensurate with the loan? Nor do I think that it can be said to be contrary to public policy for stockholders to combine for a long term of years, because such a combination may enable a minority to control the corporation. Practically the only way in which holders of small amounts of stock can protect themselves at all is by means of a combination by which they act together. If this is not permitted to them, large stockholders, even though they may not hold a majority of the stock, will possess a great advantage in the management of the corporate affairs, and I cannot see how public policy is violated by allowing small stockholders to make their union effective by making it endure for more than three years."

¹⁸³ In re Election of Directors of Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635.

¹⁸⁴ State v. Chute, 34 Minn. 135, 24 N. W. 353.

¹⁸⁵ Id.

¹⁸⁶ See Trustees of School Dist. No. 3 v. Gibbs, 2 Cush. (Mass.) 39, 45; Inhabitants of First Parish in Sudbury v. Stearns, 21 Pick. (Mass.) 148; Wardens of Christ Church v. Pope, 8 Gray (Mass.) 140; Ex parte Murphy, 7 Cow. (N. Y.) 153; In re Election of Directors of Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635; In re Argus Co., 138 N. Y. 557, 34 N. E. 388, 391.

¹⁸⁷ Ex parte Murphy, 7 Cow. (N. Y.) 153.

Where votes rejected by inspectors at an election of directors, which, if received, would have elected certain candidates, are adjudged to have been erroneously rejected, the only remedy is to set aside the election. The court has no power to declare those candidates elected for whom the votes would have been cast if they had been received.¹⁸⁸ But the court may vacate the seats of directors elected by illegal votes, and declare those elected who received a majority of the legal votes.¹⁸⁹

ELECTION AND APPOINTMENT OF OFFICERS AND AGENTS.

189. Every private corporation has the inherent power to appoint officers and agents to supervise and manage its affairs.

190. No particular formalities are necessary in the appointment of officers and agents, except such as may be prescribed by the charter or by-laws.

A corporation, being impersonal, can only transact its business and make contracts through the intervention of agents. Generally, the charter of a modern corporation provides what officers and agents shall manage the affairs of the company. Usually, the management is vested in a board of directors, trustees, or managers, who are to be elected periodically by the stockholders. If the charter is silent on the subject, the stockholders may nevertheless elect directors, and invest them with the supervision and management of the corporate affairs, for the power to appoint agents is inherent in all private corporations.¹⁹⁰ A person, in becoming a member of a private corporation, impliedly consents that it shall be represented by such officers and agents as are reasonably necessary for the transaction of its business, and that they shall possess such powers and perform such duties as are ordinarily possessed and performed by such officers and agents.¹⁹¹

In the appointment of officers and agents of a corporation, no particular formalities are necessary, except in so far as they may be

¹⁸⁸ In re Election of Directors of Long Island R. Co., 19 Wend. (N. Y.) 87, 32 Am. Dec. 429; People v. Phillips, 1 Denio (N. Y.) 388, 396; Grommes v. Sullivan, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419.

¹⁸⁹ Ex parte Desdoity, 1 Wend. (N. Y.) 98. A stockholder may obtain an injunction to restrain persons illegally elected directors from acting. Reynolds v. Bridenthal, 57 Neb. 280, 77 N. W. 658.

¹⁹⁰ Ang. & A. Corp. § 231; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852, 855.

¹⁹¹ Protection Life Ins. Co. v. Foote, 79 Ill. 361.

prescribed by the charter or by-laws. A seal is not necessary unless it is so required.¹⁹² Nor is a formal vote necessary. "Where one has the actual charge and management of the general business of a corporation, with the knowledge of the members and directors, this is evidence of his authority, without showing any vote or other corporate act constituting him the agent of the corporation."¹⁹³ Usually a board of directors is elected by the stockholders, and the directors appoint other officers and agents.¹⁹⁴ Like a natural person, as we shall see, a corporation may become liable for the acts of a person as its agent by allowing him to appear as having authority to act for it.¹⁹⁵ And it may ratify and render binding acts done without previous authority.¹⁹⁶

QUALIFICATIONS OF DIRECTORS OR OTHER OFFICERS.

191. No particular qualification is necessary for directors or other officers, unless required by statute, or by the charter or by-laws; but they are generally so expressly required to be stockholders.

Unless required by statute, or by the charter or by-laws of the corporation, a person, to be a director or other officer, need have no particular qualifications. He is generally required to be a stockholder, and, even in the absence of any such requirement, directors are usually chosen by the stockholders from their own number; but there is no rule of law that makes the ownership of stock an indispensable qualification of a director, where there is no such express requirement.¹⁹⁷ Where a director is required to be a stockholder, it has been held sufficient if he holds stock and appears as owner on the books of the corporation, though the share may have been transferred to him merely for the purpose of qualifying him;¹⁹⁸ but this is doubt-

¹⁹² *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299, 3 L. Ed. 351, 1 Cumming, Cas. Priv. Corp. 112; 1 Mor. Priv. Corp. § 504; ante, p. 155.

¹⁹³ *Goodwin v. Screw Co.*, 34 N. H. 378, 1 Cumming, Cas. Priv. Corp. 119. And see *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137.

¹⁹⁴ Post, p. 478.

¹⁹⁵ Post, p. 484.

¹⁹⁶ Post, p. 486.

¹⁹⁷ *Wight v. Railroad Co.*, 117 Mass. 226, 19 Am. Rep. 412; *Bristol Bank & T. Co. v. Jonesboro Banking Trust Co.*, 101 Tenn. 545, 48 S. W. 228. Contra, dictum in *Penobscot R. Co. v. Dummer*, 40 Me. 172, 68 Am. Dec. 654. Where statute so requires, on sale of his stock a director ceases to be director. *Oudin & B. Fire Clay Min. & Mfg. Co. v. Conlan*, 34 Wash. 216, 75 Pac. 798.

¹⁹⁸ *State v. Leete*, 16 Nev. 242; *In re Argus Printing Co.*, 1 N. D. 435, 48 N. W. 347, 12 L. R. A. 781, 26 Am. St. Rep. 639. One who holds stock as executor may be a director. *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929, 72 Am. St. Rep. 427.

ful, for such a requirement seems clearly to contemplate beneficial ownership of stock by directors.¹⁹⁹

In the absence of express prohibition, a nonresident may be a director; and where directors are required to be stockholders, and nonresidents are not prohibited from owning stock, a nonresident stockholder may be a director.²⁰⁰ But in some states the directors, or at least a certain number of them, are expressly required to be residents of the state.²⁰¹

In the absence of express provision to the contrary, a director may at the same time hold some other office, as cashier, treasurer, president, etc.²⁰² Indeed, it is generally so.

Persons dealing with a corporation are not bound to inquire into the qualifications of those whom the corporation holds out as its directors. If a corporation elects a person or director who is ineligible to the office, under the by-laws, and permits him to act as such, it will be bound by his acts as director.²⁰³

POWERS OF DIRECTORS, ETC.

192. Where the general management of a corporation is intrusted to a board of directors or other officers, they have the power to bind the corporation by any act or contract within the powers conferred upon it, except that they cannot effect any great and radical change in the organization of the body, without the assent of the stockholders, unless the power is expressly conferred. The board of directors may delegate an authority to a committee, or to one of their own number, or to third persons, to do acts for the company. And they may ratify acts done without such previous authority. They cannot, however, delegate the exercise of a discretion vested in them.

Where the directors are given the management and control of the corporation, and there are no express limitations on their power, they are competent to make any contract which may be necessary or fit and proper to enable the corporation to accomplish the pur-

¹⁹⁹ In *Re Elias*, 17 Misc. Rep. 718, 40 N. Y. Supp. 910, it was held that the New York law providing that "the directors of every stock corporation shall be chosen from the stockholders," and that, "if a director shall cease to be a stockholder, his office shall become vacant," requires the beneficial ownership of stock, as well as the legal title, and that a mere trustee of stock is not eligible for the office of director. And see *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644.

²⁰⁰ *Com. v. Detwiller*, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

²⁰¹ See *Horton v. Wilder*, 48 Kan. 222, 29 Pac. 566.

²⁰² *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

²⁰³ *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205, 87 Am. Dec. 203.

poses of its creation. The expediency of making such a contract is committed absolutely to their judgment, and so long as they keep within the power conferred upon the corporation, and act in good faith, with honest motives and for honest ends, their contracts are valid, and conclude the corporation and the stockholders.²⁰⁴ Being invested with the general management of the business of the company, the management and transaction of all business within the powers of the corporation, and the general affairs of the corporation, devolve upon them.²⁰⁵ Thus, they may make or authorize a valid assignment of the corporate property for the benefit of creditors, where it is in failing circumstances.²⁰⁶ And they may borrow money, when necessary, and mortgage or convey real estate or personal property of the corporation to pay or secure its debts.²⁰⁷ And they may assign over securities belonging to the company,²⁰⁸ or compromise a claim or action pending against it.²⁰⁹ And they may accept an amendment of the charter authorizing the corporation to take property under the power of eminent domain.²¹⁰

As we have seen in a previous section, when the charter of a corporation invests a board of directors or trustees with the power to manage its concerns the power is exclusive, and they alone can act. The stockholders cannot act, nor can they interfere with the directors in their management, or control them otherwise than by electing new directors.²¹¹

It must not be supposed that the powers of the directors are unlimited. They are only invested with the power to manage the affairs

²⁰⁴ *Park v. Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162.

²⁰⁵ See *Eastern R. Co. v. Boston & M. R. R.*, 111 Mass. 125, 15 Am. Rep. 13.

²⁰⁶ *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, 714; *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; *Tripp v. Bank*, 41 Minn. 400, 43 N. W. 60; *Chamberlain v. Bromberg*, 83 Ala. 576, 3 South. 434; *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; *Vanderpoel v. Gorman*, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Hutchinson v. Green*, 91 Mo. 367, 1 S. W. 853; *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425; *Boynton v. Roe*, 114 Mich. 401, 72 N. W. 257.

²⁰⁷ *Burrill v. Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395, W. D. Smith, Cas. Corp. 112; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316. They may not pledge the future earnings. *Brown v. Bradford*, 103 Iowa, 378, 72 N. W. 648.

²⁰⁸ *President, Directors & Company of Northampton Bank v. Pepoon*, 11 Mass. 288.

²⁰⁹ *Donohoe v. Mining Co.*, 66 Cal. 317, 5 Pac. 495; *Chambers v. Chambers & McKee Glass Co.*, 185 Pa. 105, 39 Atl. 822.

²¹⁰ *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; ante, p. 47.

²¹¹ Ante, p. 433.

of the corporation, and here their authority ends. They have no power to effect any radical change in the organization of the body without the consent of the stockholders. Such powers are impliedly reserved to the stockholders. Thus, where the charter of a corporation empowers it to increase its capital stock, or to make any other fundamental change, but does not provide by whom the power is to be exercised, it cannot be exercised by the board of directors without the assent of the stockholders.²¹² Nor, on the same principle, can the board of directors wind up the affairs of the company, and dispose of all its property,²¹³ unless it is insolvent, in which case, as we have seen, they may make an assignment for the benefit of creditors.²¹⁴

The directors can lawfully do no act that is not within the powers conferred upon the corporation by its charter. If they attempt to do so, and, for any reason relief cannot be obtained through the corporation, a stockholder may maintain a suit to enjoin them.²¹⁵

Unauthorized acts or contracts done or entered into by the directors may be ratified by the stockholders, if within the powers of the corporation, and ratification will be implied if they delay for an unreasonable time to take steps to set the transaction aside.²¹⁶

Directors de Facto.

Directors de facto, holding office under color of an election, and having charge of the affairs of a corporation, are capable of binding the corporation in all matters legitimately devolving upon directors; and the fact that their election was void and is set aside, and they are removed from office, cannot affect the validity and binding effect of their acts while in office.²¹⁷

Appointment of Agents—Ratification.

The board of directors, having general superintendence and active management of the affairs of a corporation, constitute the corporation, to all purposes of dealing with others on its behalf, and do not exercise a delegated authority, in the sense of the maxim, "Delegatus non potest delegare," like agents and attorneys who exercise the powers especially conferred upon them, and no others. Therefore

²¹² Com. v. Cullen, 13 Pa. 133, 53 Am. Dec. 450; ante, p. 347.

²¹³ 1 Mor. Priv. Corp. § 513; Consolidated Water-Power Co. v. Nash, 109 Wis. 490, 85 N. W. 485; Forrester v. Butte & Montana Consol. C. & S. M. Co., 21 Mont. 544, 55 Pac. 229, 353.

²¹⁴ Ante, p. 473.

²¹⁵ Ante, p. 375.

²¹⁶ State v. Smith, 48 Vt. 266; Steger v. Davis, 8 Tex. Civ. App. 23, 27 S. W. 1068; Aurora Agricultural & H. Soc. v. Paddock, 80 Ill. 283; Reichwald v. Hotel Co., 106 Ill. 439; post, p. 486.

²¹⁷ Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707. And see Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Collier v. Consolidated Ry., L. & R. Co., 70 N. J. Law, 313, 57 Atl. 417. But see Schwab v. Frisco Min. & Mill. Co., 21 Utah, 258, 60 Pac. 940.

a board of directors may delegate an authority to a committee, or to one of their own number, or to some other officer, or to outsiders, if they choose, to do acts for the company.²¹⁸ Thus, they may authorize a committee of their own number to alienate or mortgage real estate; and such authority necessarily implies an authority to execute suitable and proper instruments for that purpose, and to affix the corporate seal to an instrument requiring it.²¹⁹ And the board may authorize one of their number, or some other officer, to assign over any securities belonging to the company which it has the power to assign,²²⁰ or to execute notes for money loaned to the company.²²¹

But the board cannot delegate to an agent the power to exercise the discretion conferred upon them by the charter. Thus, the power, at discretion, to sell or purchase real property, cannot be delegated, but the board themselves must determine whether to purchase or sell. They can delegate to an agent the power to purchase or sell, after they have determined to do so, but they cannot delegate the power to determine whether the purchase or sale shall be made.²²²

The board may ratify and render valid an act done without previous authority, in any case where they could have authorized it; and they may do so impliedly as well as expressly, as by recognizing the act as binding and acting upon it.²²³

²¹⁸ *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; *Sheridan Electric L. Co. v. Chatham Nat. Bank*, 127 N. Y. 517, 28 N. E. 467.

²¹⁹ *Burrill v. Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *W. D. Smith, Cas. Corp.* 112.

²²⁰ *President, Directors & Company of Northampton Bank v. Pepoon*, 11 Mass. 288. See, also, *Sheridan Electric Light Co. v. Chatham Nat. Bank*, 127 N. Y. 517, 28 N. E. 467.

²²¹ *Leavitt v. Mining Co.*, 8 Utah, 265, 1 Pac. 856.

²²² *Bliss v. Irrigation Co.*, 65 Cal. 502, 4 Pac. 507. See, also, *Weidenfeld v. Sugar Run R. Co.* (C. C.) 48 Fed. 615; *Canada-Atlantic & Plant S. S. Co. v. Flanders* (C. C. A.) 145 Fed. 875; *Tempel v. Dodge*, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222; *Caldwell v. Mutual Reserve F. L. Ass'n*, 53 App. Div. 245, 65 N. Y. Supp. 826. Where by the charter the powers of the corporation are vested in the stockholders, they may authorize the board to delegate its powers to an executive committee. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265.

²²³ *Burrill v. Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *W. D. Smith, Cas. Corp.* 112; *Calumet Paper Co. v. Haskell-Snow Printing Co.*, 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425.

DIRECTORS' MEETINGS AND RESOLUTIONS.

193. Where the management of a corporation is vested in a board of directors or trustees, they are the agents of the corporation only when legally acting as a board. They cannot bind the corporation by individual action, but only when regularly assembled at a board meeting.

194. The principal rules relating to directors' meetings are these:

- (a) In the absence of express prohibition, directors may meet, and act as agents of the corporation, in another state.
- (b) Notice of the time and place of the meeting must generally be given each director, unless the meeting is a stated one. But,
 - (1) If all the directors are present, want of notice is immaterial.
 - (2) If the charter makes less than all the directors a quorum, with power to transact business, and does not require notice, a quorum may meet and transact business without the presence of, or notice to, the other directors.
- (c) In the absence of express provision otherwise, a majority of the directors constitute a quorum, and a majority of the quorum may decide any question upon which they may act.
- (d) A director is disqualified to vote upon any resolution in which he is personally interested.
- (e) Unless the charter or by-laws so require, the votes and decisions of the directors need not be recorded.

Directors must Act as a Board.

Where the government of a corporation and management of its affairs are vested in a board of directors (or, as in some states, in a board of trustees), the legal effect is to invest the directors with such government and management as a board, and not otherwise. The general rule is that the governing body, as such, of a corporation, are agents of the corporation only as a board, and not individually. They have authority to act for the corporation only when regularly assembled at a board meeting. The separate action of one or of all of the directors individually is not the action of the body clothed with the corporate powers, and does not bind the corporation.²²⁴

²²⁴ *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261. In this case a conveyance of land belonging to a corporation was executed in the name of the corporation by all the directors acting separately, and not as a board, and without any authority from the board. It was held void as a conveyance, and equally ineffectual as a contract to convey. See, also, *In re Marselles Extension R. Co.*, 7 Ch. App. 161; *D'Arcy v. Railway Co.*, L. R. 2 Exch. 158; *Filon v. Brewing Co.*, 60 Hun, 582, 15 N. Y. Supp. 57; *Schumm v. Seymour*, 24 N. J. Eq. 143; *First Nat. Bank v. Christopher*, 40 N. J. Law, 435, 29 Am. Rep. 262; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Cammeyer v. United Churches*, 2 Sandf. Ch. (N. Y.) 186; *Stoystown & G. Turnpike R. Co. v. Craver*, 45 Pa. 386; *Buttrick v. Railroad Co.*, 62 N. H. 413, 13 Am. St. Rep. 578; *Hillyer v. Mining Co.*, 6 Nev. 51; *Calumet Paper Co. v. Haskell Show Printing Co.*, 144

Special Meetings.

Although, by the rules of the corporation, the directors are to have stated meetings, it does not follow that they can have none other. On the contrary, it is a necessary power, incident to the faithful discharge of their trust, that they shall have special or informal meetings when the interests of the corporation require it.²²⁵

Place of Meeting.

There is nothing to prevent a corporation from acting by its agents outside of the state by which it was created, if the state in which the acts are done raises no objection. A corporation cannot itself act outside of the state, for it can have no legal existence save in the state to whose laws it owes its existence. They can have no extraterritorial effect.²²⁶ It can, however, appoint agents, and they may act for it beyond the limits of the state.²²⁷ For most purposes the directors are merely the agents of the corporation, and act as such in the management of its affairs. Therefore, as a general rule, in the absence of express provision to the contrary,²²⁸ they may hold their meetings, and act for the corporation, in another state than that by which it was created.²²⁹ Thus, it has been held that they may meet outside the state, and confer authority upon an agent to execute a deed, mortgage, or other instrument for the corporation,²³⁰ or appoint a secretary.²³¹

Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425; *Morrison v. Wilder Gas Co.*, 91 Me. 492, 40 Atl. 542, 64 Am. St. Rep. 257; *Peirce v. Morse Oliver Bldg. Co.*, 94 Me. 406, 47 Atl. 914; *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449, 34 S. E. 176; *Broughton v. Jones*, 120 Mich. 462, 79 N. W. 691. In Vermont the rule seems otherwise. In *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 159, it was held that directors could bind their corporation by acting separately, if this was their usual practice in transacting the corporate business. See, also, *Longmont Supply Ditch Co. v. Coffman*, 11 Colo. 551, 19 Pac. 508. And see *National State Bank v. Sandford Fork & T. Co.*, 157 Ind. 10, 60 N. E. 699. A provision in a certificate of incorporation that any resolution signed by all the members of the board of directors shall constitute action by the board, with the same force and effect as if it had been duly passed by the same vote at a duly called meeting of the board, is not authorized by the general corporation act, permitting any provision which incorporators may choose to insert in their certificate for the conduct of the affairs of the corporation, and any provision creating, defining, limiting, and regulating the powers of the directors, provided such provision be not inconsistent with the act. *Audenreid v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577.

²²⁵ *Read v. Gas Co.*, 9 Helsk. (Tenn.) 545.

²²⁶ Ante, p. 69. As to stockholders' meetings, see ante, p. 451.

²²⁷ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 521, 10 L. Ed. 274.

²²⁸ See *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519, 48 N. E. 82.

²²⁹ Post, p. 602. *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, 713.

²³⁰ *Arms v. Conant*, 36 Vt. 744; *Bellows v. Todd*, 39 Iowa, 209, 217; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316.

²³¹ *McCall v. Manufacturing Co.*, 6 Conn. 428.

Notice of Meeting.

To constitute a valid directors' meeting, all the directors must have notice of the time and place of meeting, unless the meeting is a stated one, so that each one of them is chargeable with notice. It is immaterial in what way the day of the regular meetings of directors is fixed. If it has been fixed by usage, a tacit understanding of the members, or in any other way, it is enough.²³² The purpose of the meeting need not be specified, unless required by the charter or by-laws. When a meeting of directors is notified without specification of the particular purpose, it is to be understood that it is called to consider any matters pertaining to the conduct of the affairs of the corporation that may come before it.²³³ It is not necessary that the records of a corporation shall show that all the directors of the corporation had notice of a directors' meeting, or the terms of the notice. In the absence of evidence to the contrary, a sufficient notice will be presumed.²³⁴ It has been held that if, by the charter of a corporation, a certain number of directors are made a quorum, and given power to transact business, the corporation is bound by the unanimous concurrence of that number at a casual meeting, and without notice to the others, unless notice is expressly required by the charter or by-laws.²³⁵ But in the absence of such a provision a majority of the directors cannot bind the corporation where one of the directors is not present at the consultation, and has not been given notice of the proposed action, and the act is not done at a regular meeting, of which he should know, and at which he might be present.²³⁶ And, according to the prevailing rule, business may not be transacted at a special

²³² *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252, 269; *American Exch. Nat. Bank v. First Nat. Bank*, 82 Fed. 961, 27 C. C. A. 274; *Western Imp. Co. v. Des Moines Nat. Bank*, 103 Iowa, 455, 72 N. W. 657.

²³³ *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388, 394; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 45 N. W. 410, 56 Am. St. Rep. 187; *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17. If the business is of exceptional character and importance, it seems that the notice should state the purpose. *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, 173 Pa. 30, 33 Atl. 744.

²³⁴ *Sargent v. Webster*, 18 Metc. (Mass.) 497, 46 Am. Dec. 743; *Leavitt v. Mining Co.*, 3 Utah, 265, 1 Pac. 356; *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; *Fletcher v. Chicago, St. P., M. & O. Ry. Co.*, 67 Minn. 339, 69 N. W. 1084; *Balfour-Guthrie Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891.

²³⁵ *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *State v. Smith*, 48 Vt. 266; *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285. But see *Hamlin v. Union Brass Co.*, 68 N. H. 292, 44 Atl. 835. Cf. *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

²³⁶ *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205, 37 Am. Dec. 208.

meeting, where all the directors are not present, unless notice has been given to each director, and the acts of the directors at such a meeting are not binding upon the corporation.²³⁷ The fact that notice of a special meeting was not given, even where it was required by the charter or by-laws, is immaterial, if all the directors were present and participated in the proceedings.²³⁸

"Quorum" and "Majority."

In the case of a stockholders' meeting, as we have seen, no particular number are required to constitute a quorum, unless there is some charter or statutory provision.²³⁹ With directors it is otherwise. In the absence of provision to the contrary in a statute, or in the charter or by-laws, a majority of the directors are necessary to constitute a quorum.²⁴⁰ A less number cannot act so as to bind the corporation, but can only adjourn.²⁴¹ A majority is always enough to constitute a quorum, unless more are expressly required. It is not necessary that the president of a corporation should be present at a meeting of the directors, in order to authorize them to transact business, unless this is expressly required.²⁴²

A majority of the quorum have authority to decide any question upon which the board may act.²⁴³ Where the by-laws of a corporation confer upon the directors power to act in behalf of the corpora-

²³⁷ *Farwell v. Houghton Copper Works (C. C.)* 8 Fed. 66; *Doyle v. Mizner*, 42 Mich. 332, 3 N. W. 968; *Doernbecher v. Columbia City Lumber Co.*, 21 Or. 573, 28 Pac. 899, 28 Am. St. Rep. 766; *Whitehead v. Hamilton Rubber Co.*, 52 N. J. Eq. 78, 27 Atl. 897; *First Nat. Bank v. Asherville Furniture & L. Co.*, 116 N. C. 827, 21 S. E. 948; *Vaught v. Ohio County Fair Co.*, 49 S. W. 426, 20 Ky. Law Rep. 1471; *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383; *Hatch v. Lucky Bill Min. Co.*, 25 Utah, 405, 71 Pac. 865. Where notice is impracticable, as where a director is beyond reach of notice, it seems that it may be dispensed with if the emergency requires prompt action. *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 888; *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; *Bank of Little Rock v. McCarthy*, 55 Ark. 478, 18 S. W. 759, 29 Am. St. Rep. 60; *National Bank of Commerce v. Shumway*, 49 Kan. 224, 30 Pac. 411.

²³⁸ *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546; *Troy Min. Co. v. White*, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549.

²³⁹ Ante, p. 454.

²⁴⁰ *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; *Calumet Paper Co. v. Haskell-Snow P. Co.*, 144 Mo. 831, 45 S. W. 1115, 66 Am. St. Rep. 425. A by-law authorizing a quorum of five directors to transact ordinary business is valid. *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207.

²⁴¹ *Sargent v. Webster*, supra; *Leavitt v. Mining Co.*, 3 Utah, 265, 1 Pac. 356.

²⁴² *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

²⁴³ *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Leavitt v. Mining Co.*, 3 Utah, 265, 1 Pac. 356.

tion, without special limitation as to the manner, a majority may act, within the scope of the authority given to the board, and bind the corporation, either where there is a consultation of all together, and a concurrence of a majority, or where there is a regular meeting at which all might be present, and a majority actually attend and act by a major vote.³⁴⁴ And, where the act done at a meeting purports to be the act of the board, it will be presumed that it was the act of the majority, until the contrary is shown.³⁴⁵

As we have just seen, a majority of the directors cannot bind the corporation where one of the directors is not present at the consultation, and has not been given notice of the proposed action, and the act is not done at a regular meeting of which he should know, and at which he might be present.³⁴⁶

A director, unlike a stockholder at a stockholders' meeting, is disqualified to vote upon any resolution in which he is personally interested. "All the authorities agree that it is essential that the majority of the quorum of a board of directors shall be disinterested in respect to the matters voted upon."³⁴⁷

Record of Proceedings.

It is not necessary that the votes or decisions of the directors shall be recorded, unless recording is required by the charter or by-laws. If not recorded, they may be proved by parol. If they are recorded, they must be proved by the record, unless, for some reason, secondary evidence may be admissible.³⁴⁸

³⁴⁴ *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205, 37 Am. Dec. 203.

³⁴⁵ *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Helntzelman v. Association*, 88 Minn. 138, 86 N. W. 100.

³⁴⁶ *Ante*, p. 477.

³⁴⁷ *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Smith v. Association*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; *Copeland v. Manufacturing Co.*, 47 Hun. (N. Y.) 235; *Curtin v. Salmon River Hydraulic G.-M. & D. Co.*, 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132; *Leary v. Interstate Nat. Bank* (Tex. Civ. App.) 63 S. W. 149; *Hartley v. Pioneer Iron Works*, 84 N. Y. Supp. 79, 87 App. Div. 107.

³⁴⁸ *Edgerly v. Emmerson*, 23 N. H. 555, 55 Am. Dec. 207; *Ten Eyck v. Railroad Co.*, 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633; *Zalesky v. Iowa State Ins. Co.*, 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433; *Tobin v. Roaring Creek & C. R. Co.* (C. C.) 86 Fed. 1020; *Hurd v. Hotchkiss*, 72 Conn. 472, 45 Atl. 11.

AUTHORITY OF OTHER OFFICERS AND AGENTS.

- 195.** The particular officers and agents of a corporation have such authority only as is expressly conferred upon them by the charter, by-laws, or resolution of the board of directors or of the stockholders, and such as is implied because necessary or proper to enable them to perform the duties of their office.
- 196.** If a corporation holds an officer out, or allows him to appear, as having authority not usual to such an office, it will be bound by acts done by him within the scope of his apparent authority.
- 197.** A corporation may ratify any act done without previous authority which it could have authorized. And ratification will be implied from acquiescence, or acceptance of the benefits, with knowledge of the facts.

The powers of the officers of a corporation over its business and property are strictly the powers of agents,—powers either conferred by the charter, or delegated to them by the directors or managers, in whom, as the representatives of the corporation, the control of its business and property is vested. Like the agents of natural persons, they can bind their principal, the corporation, only within the scope of their authority. Their authority, like the authority of agents of natural persons, may be either express or implied. The rules relating to agency generally apply here.²⁴⁹

If the general management of the business of a corporation is intrusted to a particular officer by the directors or by the corporation, whatever may be the name given the office,—whether it be “president” or “general manager” or “secretary” or “superintendent,”—such officer has the implied power, in the absence of express limitations, to do all acts on behalf of the corporation that may be necessary or proper in performing his duties; that is, in managing the company’s affairs and conducting its business.²⁵⁰ Such a general managing officer or agent of a trading corporation, for instance, has the implied authority to borrow money on behalf of the corporation, when needed in its business, and to execute its note therefor, and to accept bills or indorse paper in the usual course of the company’s business.²⁵¹ So, a person appointed superintendent and manager of a

²⁴⁹ See Tlf. Ag. 180 et seq.

²⁵⁰ *Sun Printing & P. Ass’n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. As to powers of managing agent generally, see 10 Cyc. 923 et seq.

²⁵¹ See *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419; *Rosemond v. Northwestern Autographic Register Co.*, 62 Minn. 374, 64 N. W. 925; *Africa v.*

corporation at a particular place, where the corporation is prosecuting some work, has, in the absence of express limitation, implied authority to purchase supplies and implements, and engage services, necessary or proper for carrying on the work, and may bind the corporation by contracts therefor. His authority extends to all such usual dealings as are necessary to carry on the business from day to day.²⁵²

No officer of a corporation can bind it by any act or contract that is not within the line of his ordinary duties, unless authority is expressly conferred by the charter, or by the stockholders or board of directors. Thus, it has been held that the president and cashier of a bank have no authority, in discounting commercial paper, to agree that the indorser shall not be liable on his indorsement, and such an agreement is not binding on the bank. All discounts being made under the authority of the directors, it is for them to fix any conditions which may be proper in lending money.²⁵³ So, the treasurer, secretary, president, or other officer of a corporation has no implied authority to release a debtor of the corporation from his liability, or to give up securities belonging to the company, without payment. Such power must be expressly given, or it must be implied from a course of dealing known to and sanctioned by the corporation.²⁵⁴ Such an officer, for instance, cannot release a subscriber from liability on his subscription.²⁵⁵

The powers of the president of a corporation are such only as he derives from the board of directors or other authority to which he owes his appointment.²⁵⁶ If there is nothing in the charter bestowing special power upon him, he has, from his office merely, no more power over the corporate property and business than any other director.²⁵⁷ His powers depend upon the authority conferred upon

Duluth News Tribune Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424. Otherwise of the general manager of a nontrading corporation. Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628.

²⁵² Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 879, 10 L. R. A. 355. See, also, Thayer v. Nehalem Mill Co., 81 Ore. 437, 51 Pac. 202. He has not implied authority to grant an easement. Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co., (Mont.) 55 Pac. 112.

²⁵³ Bank of United States v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316.

²⁵⁴ Moshannon Land & Lumber Co. v. Sloan, 109 Pa. 532, 7 Atl. 102.

²⁵⁵ Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135.

²⁵⁶ As to powers of president generally see 10 Cyc. 903 et seq. As to powers of vice-president, see 10 Cyc. 922 et seq.

²⁵⁷ Titus v. Railroad Co., 37 N. J. Law, 98; Brush Electric L. & P. Co. v. City Council, 114 Ala. 433, 21 South. 960; St. Clair v. Rutledge, 115 Wis. 583, 92 N. W. 236, 95 Am. St. Rep. 964; 1 Mor. Priv. Corp. § 537; 2 Cook, Stock, Stockh. & Corp. Law, §§ 712, 716.

him by the board, and the duties with which he is charged.²⁵⁸ Thus, in the absence of special authority, he cannot dispose of or mortgage the property of the corporation.²⁵⁹

It is very generally held that the treasurer of a corporation has no implied authority, merely by virtue of his office, to borrow money and execute notes on behalf of the company, or to indorse or transfer securities belonging to the company.²⁶⁰ Such power must have been expressly conferred by the charter or by-laws, or by resolution of the board of directors, or the directors or managers must have clothed the treasurer with apparent authority.²⁶¹ But in Massachusetts it is held that, in the case of a trading or manufacturing corporation, the treasurer is clothed, by virtue of his office alone, with the power to execute notes on behalf of the company;²⁶² and this rule has in a late case been held to apply to gaslight companies, the business of which requires credit at certain seasons of the year.²⁶³ Even in Massachusetts, however, the rule is held not to extend to a college,²⁶⁴ nor to a monument association,²⁶⁵ nor to a savings bank,²⁶⁶ nor to a horse-railroad company.²⁶⁷ And two of the judges

²⁵⁸ *Id.*; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325; *Templin v. Railway Co.*, 73 Iowa, 548, 35 N. W. 634; *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; *Grant v. Duluth, M. & N. Ry. Co.*, 66 Minn. 349, 69 N. W. 23; *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634. Some cases declare that, in the absence of any showing to the contrary, the president will be presumed to have authority to act for the corporation in all matters within the ordinary scope of its business. *White v. Elgin Creamery Co.*, 108 Iowa, 522, 79 N. W. 283.

²⁵⁹ See cases above cited; and see 2 Cook, *Stock, Stockh. & Corp. Law*, § 716, and notes, where the cases are collected. See *Leggett v. Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

²⁶⁰ *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. 157, 28 Atl. 1072; *Craft v. Railroad Co.*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *Wahlig v. Manufacturing Co. (City Ct. N. Y.)* 9 N. Y. Supp. 739; *First Nat. Bank v. Council Bluffs City Waterworks Co.*, 56 Hun, 412, 9 N. Y. Supp. 859; *Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480, 38 Atl. 241. And see *Chemical Nat. Bank of New York v. Wagner*, 93 Ky. 525, 20 S. W. 535, 40 Am. St. Rep. 206.

²⁶¹ As to apparent authority, see post, p. 484.

²⁶² *Narragansett Bank v. Atlantic Silk Co.*, 8 Metc. (Mass.) 282; *Fay v. Noble*, 12 Cush. (Mass.) 1; *Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453.

²⁶³ *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, supra.

²⁶⁴ *Webber v. College*, 23 Pick. (Mass.) 302.

²⁶⁵ *Torrey v. Association*, 5 Allen (Mass.) 327.

²⁶⁶ *Tappan v. Bank*, 127 Mass. 107, 34 Am. Rep. 351. And see *Jewett v. West Somerville Co-op. Bank*, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. Rep. 259; *Slattery v. North End. Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

²⁶⁷ *Craft v. Railroad Co.*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641.

dissented from the decision applying the rule to gaslight companies.²⁶⁸ The treasurer of a corporation has no implied authority to consent to judgment against the company without suit.²⁶⁹

The cashier of a bank, by custom, is its executive officer, through whom the whole financial operations of the bank are conducted.²⁷⁰ He has implied authority, from his office, without special authority, to transact the ordinary business of the bank, as to receive deposits, and packages of money consigned to the bank; to draw and indorse bills of exchange, checks, and drafts;²⁷¹ and to certify checks.²⁷² So he has the implied authority to transfer and indorse negotiable notes or bills belonging to the bank,²⁷³ or to release a debt secured by mortgage, if he acts in conformity to the rules and practice of the bank.²⁷⁴ But he has no authority, unless it is expressly conferred upon him, to bind the bank by acts and contracts which do not relate to the ordinary business of the bank, or to his ordinary duties as cashier.²⁷⁵ Where discounts, for instance, are made under the authority of the board of directors, and not of the cashier, the cashier can make no special agreement in lending money.²⁷⁶ Nor can a cashier contract with the government, on behalf of the bank, for the transfer of money.²⁷⁷ The ordinary duties of cashiers of banks do not comprehend a contract which involves the payment of money, unless it has been loaned in the usual way, nor can a cashier create an agency for the bank, unless he has been expressly authorized to do so.²⁷⁸ Nor can the cashier of a bank execute a mortgage on its property.²⁷⁹

Persons dealing with a corporation are bound to take notice of its charter, and, it is often said of its by-laws, and if, by these, contracts are required to be made by certain officers or agents only, they cannot hold the corporation liable on a contract made with any other officer or agent. They are bound, at their peril, to ascertain whether the person assuming to contract for the corporation has authority

²⁶⁸ Field, C. J., and Allen, J., dissented.

²⁶⁹ Stevens v. Iron Co., 57 Mich. 427, 24 N. W. 160.

²⁷⁰ See Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; West St. Louis Savings Bank v. Parmalee, 95 U. S. 557, 24 L. Ed. 490. As to his authority generally, see Morse, Banks & B. §§ 152, 160.

²⁷¹ Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

²⁷² Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008.

²⁷³ Wild v. Bank of Passamaquoddy, 8 Mason, 505, Fed. Cas. No. 17,646.

²⁷⁴ Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

²⁷⁵ Bank of U. S. v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316; U. S. v. City Bank, 21 How. (U. S.) 856, 16 L. Ed. 180.

²⁷⁶ Bank of U. S. v. Dunn, supra.

²⁷⁷ U. S. v. City Bank, supra.

²⁷⁸ Id.

²⁷⁹ Leggett v. Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 723.

to bind it.²⁸⁰ This principle is qualified by another, which we shall consider in the following paragraph, namely, that, where a corporation allows another to appear as having authority to bind it in a particular transaction, it will be estopped to deny the apparent authority with which it has clothed him, to the prejudice of persons dealing with him, and cannot even set up a by-law to limit such apparent authority.²⁸¹

Holding Out—Agency by Estoppel.

It is a well-settled principle of the law of agency that third persons may act upon the apparent authority conferred by the principal upon the agent, and are not bound by secret limitations or instructions qualifying the terms of the written or verbal appointment, and this applies with full force to a corporation which clothes a person with apparent authority to act as its agent.²⁸² An officer of a corporation may, by the acts of its directors or managers, be invested with the authority to bind the company by his acts beyond those powers which are inherent in and implied from his office. If, in the general course of the company's business, the directors or managers have permitted an officer to assume the direction and control of its affairs, and have held him out to the public as its general agent, his authority to act for the company in a particular transaction may be implied from the manner in which he has been permitted by the directors or managers to transact its business.²⁸³ Thus, though the treasurer of a corporation may have no implied authority, by virtue of his office alone, to borrow money and issue negotiable paper therefor on behalf of the corporation, nor to draw or accept bills of exchange or indorse notes,

²⁸⁰ *Bocock's Ex'r v. Iron Co.*, 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128; *Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

²⁸¹ *Post*, pp. 485, 486. *Ante*, p. 447.

²⁸² *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 879, 10 L. R. A. 355; *Marshall v. Express Co.*, 7 Wis. 1, 73 Am. Dec. 381; *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454; *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137; *St. Clair v. Rutledge*, 115 Wis. 583, 92 N. W. 234, 95 Am. St. Rep. 964; *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633; *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843, 38 C. C. A. 433.

²⁸³ *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *McNeill v. Boston Chamber of Commerce*, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1031; *Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480, 38 Atl. 241; *Chicago Tip & T. Co. v. Chicago Nat. Bank*, 176 Ill. 224, 52 N. E. 52; *Chambers v. Lancaster*, 160 N. Y. 842, 54 N. E. 707; *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633; *National State Bank v. Sandford Fork & T. Co.*, 157 Ind. 10, 60 N. E. 699; *Carrington v. Turner*, 101 Md. 437, 61 Atl. 324.

yet, if the directors or other managers allow him to do so, authority will be implied.²⁸⁴

As we have seen in the preceding paragraph, persons dealing with a person as agent of a corporation are bound to know whether or not he has authority to represent it. This does not mean that they cannot assume that his apparent authority is real, nor that, if a person contracts with an agent acting within the apparent scope of his authority, he is bound, at his peril, to ascertain whether there are any extrinsic facts limiting his authority in the particular transaction. If an officer of a corporation acts within the apparent scope of his authority, persons dealing with him are not bound to have knowledge of extrinsic facts making it improper to act in the particular case.²⁸⁵

By-laws of business corporations are, as to third persons, private regulations, binding as between the corporation and its members, or third persons having knowledge of them; but they are of no force as limitations, per se, as to third persons, of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency. Therefore, where a corporation, for the purpose of mining, among other things, appointed a person "superintendent and manager" at a particular place, it was held that he had apparent authority to purchase, on the credit of the corporation, supplies and implements for carrying on the work, and that the rights of persons contracting with him within such apparent authority could not be affected by a by-law of the corporation, of which they had no notice, providing that no debt should be contracted by any officer or agent of the corporation, nor any obligation created imposing liability upon it, unless expressly authorized by a majority of the board of trustees.²⁸⁶

²⁸⁴ Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. Law, 513, 7 Atl. 318; Page v. Railroad Co. (C. C.) 31 Fed. 257; Credit Co. v. Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123. "The rule is well settled that if a corporation permit the treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his general name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority." Lester v. Webb, 1 Allen (Mass.) 34. See, also, Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707.

²⁸⁵ Credit Co. v. Howe Mach. Co., 54 Conn. 357, 8 Atl. 472; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 2 Cumm. Cas. Priv. Corp. 119; Allison v. Tennessee Coal, I. & R. Co. (Tenn. Ch.) 46 S. W. 348; post, p. 511.

²⁸⁶ Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355. See, also, Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 44 N. E. 410, 56 Am. St. Rep. 187; Powers v. Schlicht Heat, L. & P. Co., 48 N. Y. Supp. 237, 23 App. Div. 380, affirmed 165 N. Y. 662, 59 N. E. 1129. Cf. In re Millward-Cliff Cracker Co., 161 Pa. 157, 28 Atl. 1072.

Where a person has been appointed superintendent of a corporation's business in a foreign country, though by a resolution expressed by words in *præsentî*, with the understanding both on the part of the corporation and of the appointee that his duties and authority are not to commence until certain preliminary stages of its business shall be completed, he cannot bind the corporation before that time by holding himself out as its active agent to one who relies merely upon his representations, without any knowledge of the resolution.²⁸⁷

Agency by Ratification.

A corporation, like a natural person, may become bound by the act of a person assuming to act for it without authority, if it ratifies the act.²⁸⁸ It may ratify, and thereby render binding, any act done without authority which it could have authorized; and an act may be ratified by any officer or board who or which could have authorized it.²⁸⁹ And ratification may be implied from the conduct of the corporation or its authorized agents, as where it accepts the benefits with notice of the circumstances.²⁹⁰ Thus, if a person, professing to be authorized, mortgages the personal property of a corporation in order to procure a loan, and the money obtained thereby comes into the possession of the corporation, and is retained by it, this will be evidence of a ratification of the mortgage.²⁹¹

Ratification of an act done by one assuming to act as agent relates back, and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification, except in the same manner. Thus, if a person executes a contract or conveyance under seal for a corporation, without authority, his act can be ratified only by an instrument under seal, where, as at common law, authority to execute a sealed instrument must be under seal.

²⁸⁷ *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355.

²⁸⁸ As to ratification by corporations generally, see 10 Cyc. 1069 et seq.

²⁸⁹ *Burrill v. President, etc.*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395, W. D. Smith, Cas. Corp. 112; *McLaughlin v. Railway Co.*, 8 Mich. 100; *Leggett v. Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Aurora Agricultural & Horticultural Soc. v. Paddock*, 80 Ill. 263; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Grape Sugar & Vinegar Manuf'g Co. v. Small*, 40 Md. 395; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; *American Exch. Nat. Bank v. First Nat. Bank*, 82 Fed. 961, 27 C. C. A. 274; *Sun Printing & P. C. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633; *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345.

²⁹⁰ Cases above cited.

²⁹¹ *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205, 37 Am. Dec. 203.

But parol ratification may render the contract binding as a parol contract, if a seal is not necessary.²⁹²

Negotiable Instruments.

Where an officer of a corporation executes and issues negotiable paper, purchasers thereof buy at their peril, as to his authority to execute it; but there is this exception, namely, that if the officer, in issuing the paper, acted within the apparent scope of his authority, but in the particular instance acted wrongfully, and the purchaser had no notice of the wrongful character of the act, or of facts sufficient to put him on inquiry, the purchaser will be protected, as against the corporation.²⁹³ But if the purchaser has notice that the officer executed the paper for his own debt, or otherwise for his personal benefit, he is bound to inquire as to the officer's authority.²⁹⁴

Ultra Vires Contracts by Agents.

According to the strict rule of ultra vires, if a corporation has no power to enter into a particular contract, it cannot, by appointing an agent, become bound by such a contract entered into by him, nor can it become bound by ratification. This is too clear to require argument. "The powers of agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. * * * The same want of power to give authority to an agent to contract, and thereby bind the corporation, in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. The power of the agent must

²⁹² *Despatch Line of Packets v. Bellamy Manuf'g Co.*, supra. Where the execution of a note and mortgage could have been authorized only by a resolution of the board, equivalent to an authority in writing, within Civ. Code Cal. § 2309, a corporation can ratify an unauthorized execution by its president and secretary only in the manner that would have been necessary to confer original authority for the act ratified, as provided by section 2310, and not by an exercise of ownership over the property for the price of which the note and mortgage were executed. *Blood v. La Serena Land & W. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

²⁹³ *Chemical Nat. Bank v. Wagner*, 98 Ky. 525, 20 S. W. 535, 40 Am. St. Rep. 206; *Page v. Railroad Co.* (C. C.) 31 Fed. 257; *Wahlig v. Manufacturing Co.* (City Ct. N. Y.) 9 N. Y. Supp. 739; *Merchants' Nat. Bank v. Citizens' Gaslight Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419; *Dexter Sav. Bank v. Friend* (C. C.) 90 Fed. 703.

²⁹⁴ *Randall v. Rhode Island Lumber Co.*, 20 R. I. 625, 40 Atl. 763; *Rochester & O. Turnpike Co. v. Pavlour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 780.

be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further."²⁹⁵ As we have seen, however, the contract of a corporation is not always unenforceable because it is ultra vires,²⁹⁶ and a corporation may be liable for a tort committed by its agent in the course of an ultra vires transaction.²⁹⁷ But it must be borne in mind that every person dealing with a corporation is charged with notice of the limitations of its powers, and consequently to that extent with notice of the limitations of the authority of its agents, which cannot be broader than the powers of the corporation.²⁹⁸

NOTICE TO OFFICER AS NOTICE TO CORPORATION.

193. Knowledge of facts acquired by an officer or agent of a corporation is notice to the corporation, if acquired by him while acting within the scope of his duties, but not otherwise.

It is a well-settled principle of the law of agency that knowledge of facts acquired by an agent is notice to the principal of such facts, if the knowledge is acquired by the agent in the course of his employment, but not otherwise. This principle is applicable to agents of corporations.²⁹⁹ We have seen that the directors of a corporation represent and have power to bind the corporation only when acting as a board, at a board meeting. It follows that notice to a director, or knowledge derived by him, individually, and not while acting officially, as a member of the board, in the business of the corporation, is not to be regarded, in law, as notice to the corporation.³⁰⁰ In a

²⁹⁵ *Downing v. Road Co.*, 40 N. H. 230, 1 Cumming, Cas. Priv. Corp. 148. And see *Weckler v. Bank*, 42 Md. 581, 20 Am. Rep. 95.

²⁹⁶ Ante, p. 163.

²⁹⁷ Post, p. 510.

²⁹⁸ Ante, p. 173.

²⁹⁹ *Bank of United States v. Davis*, 2 Hill (N. Y.) 451; *National Security Bank v. Cushman*, 121 Mass. 490; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Love v. Anchor Raisin V. Co.* (Cal.) 45 Pac. 1044; *City of Denver v. Sherret*, 88 Fed. 226, 31 C. C. A. 499; *Zels v. Potter*, 105 Fed. 671, 44 C. C. A. 665. As to notice to corporations generally, see 10 Cyc. 1053 et seq.

³⁰⁰ *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 451; *Buttrick v. Railroad*, 62 N. H. 413, 13 Am. St. Rep. 578; *New Haven, M. & W. R. Co. v. Town of Chatham*, 42 Conn. 465; *Farrell Foundry v. Dart*, 26 Conn. 376; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193. Otherwise if communicated to the director for the purpose of being communicated to the board. *United States Ins. Co. v. Schriver*, 3 Md. Ch. 381. Knowledge possessed by a director while acting with the board with reference to a mat-

Connecticut case, after a defective deed had been recorded, purporting to convey certain land, one of the directors of a corporation, not acting as agent of the corporation, and having no management of its business otherwise than as director, went to the town records for the purpose of ascertaining the situation of the land, and there saw the record of the deed; but he did not inform the corporation, or any of its agents, thereof. It was held that the corporation was not, by reason of these facts, chargeable with any knowledge of the deed.⁸⁰¹ The same principle has often been applied where it was sought to charge a corporation with notice in order to defeat its claim as a bona fide holder of negotiable paper.⁸⁰²

This doctrine is by no means limited to directors. It applies to all officers and agents, the only qualification being that the knowledge must be acquired in the course of their employment.⁸⁰³ As was said by the Alabama court in a late case: "Notice to one agent of a corporation with respect to a matter covered by his agency must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing."⁸⁰⁴ If the officer does not represent the corporation in the transaction by which he ac-

ter acted upon is notice to the corporation. *National Security Bank v. Cushman*, 121 Mass. 490; 10 Cyc. 1058.

⁸⁰¹ *Farrell Foundry v. Dart*, 26 Conn. 376.

⁸⁰² *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362, *Holm v. Atlas Bank*, 84 Fed. 119, 28 C. C. A. 297, and other cases in note 300, supra. In this case it appeared that a director of a bank had knowledge of the object for which certain bills of exchange were delivered to a party applying to the bank for a discount thereof, but this director was not present at the meeting of the directors at which such application was made, and the bills discounted; and he did not communicate his knowledge to any other director or officer of the bank. It was held that such knowledge on the part of the director was not notice to the bank.

⁸⁰³ *Saint v. Manufacturing Co.*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210. Thus, where a defaulting treasurer of a corporation, whose defalcation was as yet unknown, stole money from a third person, and placed it with the funds of the corporation, in order to conceal and make good his defalcation, without the knowledge of any other officer, it was held that the corporation, having used the money as its own, did not thereby acquire a good title to it, as against the true owner, since it was charged with the knowledge of its treasurer, who was its representative in the transaction. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698; *Huron Printing & Binding Co. v. Kittleson*, 4 S. D. 520, 57 N. W. 233; *Brennan v. Emery-Bird-Thayer D. G. Co.* (C. C.) 99 Fed. 971.

⁸⁰⁴ *Saint v. Manufacturing Co.*, 95 Ala. 362, 10 South. 539, 544, 36 Am. St. Rep. 210.

quires knowledge of facts, or where he is acting in his own interest, and against the interest of the corporation,—as where an officer of a corporation procures the corporation to discount a note, of the illegal consideration of which he has knowledge, or where he sells and conveys land to the corporation with knowledge of outstanding equities,—in which case he could not be supposed to give notice to the corporation, his knowledge cannot be imputed to the corporation.³⁰⁵

CONTRACTS BETWEEN STOCKHOLDER AND CORPORATION.

199. Stockholders or members in a corporation have as much right to contract with it as if they were strangers, and have the same rights under such contracts as a stranger would have.

The members or stockholders, as we have heretofore pointed out, compose the corporation, but they are not the corporation. They have as much right to deal with the corporation as a stranger would have, and may sue it on its contracts. Thus, they may advance money to it in excess of the capital contributed, and the result will be a debt due them by the corporation, which will stand upon exactly the same footing as such a debt due to a stranger.³⁰⁶ And a stockholder who is a creditor of the corporation may be preferred in an assignment made by it in any case where a creditor not connected with the corporation could be preferred.³⁰⁷ A majority stockholder of a railroad corporation, if he is not in control of the property and

³⁰⁵ Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; Johnston v. Shortridge, 93 Mo. 227, 6 S. W. 64; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; Wickersham v. Zinc Co., 18 Kan. 481, 28 Am. Rep. 784; Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Casco Nat. Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; Seaverns v. Presbyterian Hospital, 173 Ill. 414, 50 N. E. 1079, 64 Am. St. Rep. 125; Ft. Dearborn Nat. Bank v. Seymour, 71 Minn. 81, 73 N. W. 724; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Hadden v. Dooley, 92 Fed. 274, 34 C. C. A. 338.

³⁰⁶ See Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Langston v. Greenville Land & I. Co., 120 N. C. 182, 26 S. E. 644; Hitt v. Sterling-Gould Mfg. Co., 111 Iowa, 458, 82 N. W. 919. Stockholders of a corporation, who do not control its directors, owe no duty to it not to conceal from the directors that they are interested in another corporation with which the directors are about to make a contract, and such contract is valid notwithstanding such concealment. Fox v. Mackay, 125 Cal. 57, 57 Pac. 670; ante, p. 7. And a stockholder who is a creditor may take a mortgage to secure the debt. Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76.

³⁰⁷ Lexington Life, Fire & Marine Ins. Co. v. Page, *supra*.

does not mismanage the affairs of the company for his own benefit, may purchase the property of the corporation at a judicial sale.⁸⁰⁸

RELATION BETWEEN OFFICERS AND CORPORATION.

200. The officers of a corporation, being its agents, and intrusted with the management of its affairs, though not strictly trustees, occupy a fiduciary relation towards it, and cannot, directly or indirectly, derive any personal advantage or profit from their position which is not enjoyed in common by all the stockholders. Any secret profits made by them in the transaction of the company's business belong to the company.

The cases do not agree in the terms used to designate the relation existing between the directors and other officers of a corporation and the corporation. In most of the cases they are spoken of as "trustees."⁸⁰⁹ In others they are spoken of as "agents."⁸¹⁰ And in others they are termed "mandataries."⁸¹¹ By the better opinion, they are not strictly trustees, but they are simply the agents of the corporation, and they are governed by the rules of law applicable to other agents.⁸¹² However much the authorities may disagree in the use

⁸⁰⁸ *Rothschild v. Memphis & C. R. Co.*, 113 Fed. 476, 51 C. C. A. 310.

⁸⁰⁹ *In re Cameron's Coalbrook, etc., Ry. Co.*, 18 Beav. 839; *Liquidators of The Imperial Mercantile Credit Ass'n v. Coleman*, L. R. 6 H. L. 189; *Koehler v. Iron Co.*, 2 Black, 721; *Robinson v. Smith*, 3 Palge (N. Y.) 222, 24 Am. Dec. 216; *Shea v. Mabry*, 1 Lea (Tenn.) 319; *Cumberland Coal Co. v. Sherman*, 80 Barb. (N. Y.) 553; *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667. See note, 53 Am. Dec. 637.

⁸¹⁰ *Ferguson v. Willson*, 2 Ch. App. 77; *Allen v. Curtis*, 26 Conn. 456; *Overend & Gurney Co. v. Gibb*, L. R. 5 H. L. 480.

⁸¹¹ *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684.

⁸¹² See 1 Mor. Corp. § 516; note, 53 Am. Dec. 637; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487. "The liability of officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority or neglects his duty to the damage of his principal." *North Hudson Mut. Bldg. & Loan Ass'n v. Childs*, 82 Wis. 460, 52 N. W. 600, 605, 33 Am. St. Rep. 57. "Bank directors are often styled 'trustees,' but not in any technical sense. The relation between the corporation and them is rather that of principal and agent." *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 929, 35 L. Ed. 662. "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees; but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries,—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary care and

of terms to describe the relation, they all agree that the relation is a fiduciary one, and it is generally to express this idea that the relation is spoken of as a "trust relation."

Since the relation between the directors and the corporation is fiduciary, it follows that a director cannot, directly or indirectly, derive any personal profit or advantage by reason of his position that is not enjoyed in common by all the stockholders.⁸¹³ A director, said the Pennsylvania court in a late case, is a trustee for the entire body of stockholders, and both good morals and good law imperatively demand that he shall manage all the business affairs of the company with a view to promote the common interests, and not his own interests; and he cannot, directly or indirectly, derive any personal profit or advantage, by reason of his position, distinct from the other stockholders. "By assuming the office, he undertakes to give his best judgment, in the interests of the corporation, in all matters in which he acts for it, untrammelled by any hostile interest in himself or others. There is an inherent obligation on his part that he will in no manner use his position to advance his own interest as an individual, as distinguished from that of the corporation. And all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made also advantaged the corporation of which he was director."⁸¹⁴ Thus, where the directors of a corporation secured their own debts by a mortgage of the corporate property, it was held that the mortgage should be set aside.⁸¹⁵ So, where the president of a bank, who was also a director, loaned the moneys of the bank, on a note running to the bank, at a stipulated rate of interest, but on a secret agreement with the borrowers that he should participate in the profits of lands to be purchased with the money, it was held that he was guilty of a breach of trust, and that the profits so acquired by him belonged to the bank.⁸¹⁶

diligence, and no more." Per Sharswood, J., in *Spring's Appeal*, 71 Pa. 11, 10 Am. Rep. 684.

⁸¹³ *Arkansas Val. Agr. Soc. v. Elchholtz*, 45 Kan. 164, 25 Pac. 613.

⁸¹⁴ *Bird Coal & Iron Co. v. Humes*, 157 Pa. 278, 27 Atl. 750, 37 Am. St. Rep. 727. See, also, *Koehler v. Iron Co.*, 2 Black (U. S.) 715, 17 L. Ed. 339; *Farmers' & Merchants' Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62; *Parker v. Nickerson*, 112 Mass. 195; *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509; *Cook v. Sherman* (C. C.) 20 Fed. 167; *Perry v. Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 South. 217; *Flint & P. M. Ry. Co. v. Dewey*, 14 Mich. 477; *Rutland Electric Light Co. v. Bates*, 68 Vt. 579, 35 Atl. 480, 54 Am. St. Rep. 904. Compare *Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325, where stockholders were held barred of relief by reason of laches.

⁸¹⁵ *Koehler v. Iron Co.*, *supra*.

⁸¹⁶ *Farmers' & Merchants' Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62.

This doctrine does not apply where an officer of a corporation enters into a transaction in which he owes no duty to the corporation. It is said by Morawetz that a director or other agent of a corporation may purchase property, and afterwards sell it to the corporation at an advance, provided it was not his duty at the time of the purchase to purchase for the corporation, and that he may purchase claims against the corporation at a discount, and enforce them in full, if he was under no obligation to purchase them for the corporation; and this proposition is abundantly supported by authority.⁸¹⁷ If he was under any duty to the company, however, at the time of the purchase, it may claim the benefit of any profit or advantage realized by him. As we shall presently see, at some length, the fiduciary relation in which an officer stands towards the corporation disqualifies him to represent it in making contracts in which he is personally interested. There is much confusion as to the effect of contracts and transactions between a corporation and its officers. Therefore we shall reserve the subject for a separate section.

The doctrine of these cases has been applied to a purchase by a director, at an execution sale, of the corporate property, on the ground that it is the duty of a director to prevent such a sale, if possible, and, if not, then to endeavor to have the property produce the highest price, and, in order to the attainment of these objects, to use the knowledge he has derived from the confidence reposed in him as director, while, as purchaser, on the other hand, it is to his interest to pay as little as possible, and to use his special knowledge for his own advantage. And it is held in some states that in such cases actual fraud or actual advantage need not be shown; that the corporation has an absolute right to disaffirm the sale and demand a resale.⁸¹⁸ Other courts, however, hold that such a purchase is valid, if in good faith.⁸¹⁹

⁸¹⁷ 1 Mor. Corp. § 521, and cases there cited. In *St. Louis, Ft. S. & W. R. Co. v. Chenault*, 36 Kan. 51, 12 Pac. 303, where the treasurer of a railroad corporation, who, with his own money, and for himself individually, had purchased notes of the company at a discount, he was allowed to collect their full face value from the company, on the ground that, at the time of the purchase, he was under no obligation to purchase or to pay them on behalf of the company. See, also, *Glenwood Mfg. Co. v. Syme*, 109 Wis. 355, 85 N. W. 432; *Burland v. Earle* [1902] App. Cas. 83.

⁸¹⁸ *Hoyle v. Railroad Co.*, 54 N. Y. 314, 13 Am. Rep. 595.

⁸¹⁹ *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Watt's Appeal*, 78 Pa. 370; *Coombs v. Barber*, 31 Mont. 526, 79 Pac. 1.

CONTRACTS OR OTHER TRANSACTIONS BETWEEN OFFICERS AND THE CORPORATION.

201. An officer cannot, as such, on behalf of the corporation, contract with or convey to himself in his individual capacity, unless he acts under the immediate direction of a superior agent.

202. The directors or other officers of a corporation have no right to represent it in contracts or transactions with themselves, or in which they are personally interested. If they do so, the corporation not being represented by other agents who are disinterested, the contract or transaction is voidable at the option of the corporation. But,

(a) By the weight of authority, a contract or transaction with an officer, or in which he is personally interested, will be binding upon the corporation if it is shown to be fair and free from fraud, and if the corporation was represented by other agents. In New York and some other jurisdictions it is held, even in these cases, that the contract or transaction may be avoided by the corporation, and that the question of fraud is immaterial.

(b) Such a contract or transaction may be ratified by the stockholders, either expressly or impliedly, by acquiescence or acceptance of the benefits with knowledge of the facts.

(c) The corporation is liable, on avoiding the contract or transaction, for the benefits actually received and retained.

Contract or Transaction by Officer with Himself.

From the nature of things, the directors or other officers or agents of a corporation cannot contract in their representative capacity with themselves in their capacity as individuals; nor can they convey to themselves. Such a transaction would be void for want of two parties. "The idea," said Orton, J., in a Wisconsin case, "that the same persons constitute different identities of themselves by being called directors or officers of a corporation, so that, as directors or officers, they can convey or mortgage to or contract with themselves as private persons, is in violation of common sense."²⁰ But it has been held

²⁰ Haywood v. Lumber Co., 64 Wis. 639, 26 N. W. 184, 187, per Campbell, J., in People v. Township Board of Overysse, 11 Mich. 222; Miner v. Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Hill v. Marston, 178 Mass. 285, 59 N. E. 766; Janney v. Minneapolis Industrial Exposition, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273. "If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty

that an agent may represent the corporation in making a contract with himself personally, if he acts under immediate instructions from a superior agent, or from the board of directors.⁸²¹

Personal Interest of Officer in Contract or Transaction.

It is an elementary principle that the same person cannot be allowed to act for himself, and at the same time, with respect to the same matter, as the agent for another, whose interests are conflicting. Thus, a person cannot be a purchaser of property and at the same time the agent of the vendor. "The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle."⁸²² The law therefore will always condemn the transactions of a party on his own behalf, directly or indirectly, when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted.⁸²³ This doctrine applies with full force to transactions by directors or other officers of a corporation, on behalf of the corporation, in which they are personally interested. They will not be permitted to occupy a position in which their own interests will conflict with the interests of the corporation which they represent, and which they are bound to protect. It is well settled, therefore, that, where the directors or other officers or agents of a corporation are personally interested in any contract or transaction into which they enter on behalf of the corporation, the latter may repudiate it. "They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits."⁸²⁴ If any prof-

to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money." Per Miller, J., in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

⁸²¹ 1 *Mor. Priv. Corp.* § 527; *Louisville, N. A. & O. Ry. Co. v. Carson*, 151 Ill. 444, 38 N. E. 140. In this case a lease to a corporation by a lessor, who also executed the lease on behalf of the company as its vice president and manager, was held good, where it was executed in good faith, under the direction of the president, and ratified by the corporation by taking possession, and paying rent according to its terms.

⁸²² *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509.

⁸²³ *Id.*

⁸²⁴ *Id.* See, also, *Goodin v. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *United States Rolling-Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477; *Gilman, O. & S. R. Co. v. Kelly*, 77 Ill. 426; *Gallery v. National Exch. Bank*, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149; *Hook v. Ayers*, 80 Fed. 978, 26 C. C. A. 287; *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Barnes v. Lynch*,

its are made out of such a transaction, they will inure to the benefit of the corporation.⁸²⁵ Thus, where the directors of a corporation bought a steamboat in their individual capacity, and then, as directors, caused it to be purchased on behalf of the corporation at a large advance upon its cost and value, it was held that the transaction was fraudulent, and that the profits inured to the benefit of the company, and could be recovered by it, with interest.⁸²⁶ This principle has been applied in a variety of cases. There is no limit to the circumstances under which the question may arise. A director of a corporation is disqualified to vote or act, at a meeting of the board, upon any resolution in which he is personally interested.⁸²⁷ Thus, he cannot vote on a resolution authorizing the renewal of notes of the corporation

9 Okl. 156, 59 Pac. 995; *Kroegher v. Callvada Col. Co.*, 119 Fed. 641, 56 C. C. A. 257; *Scott v. Farmers' & M. Nat. Bank*, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835; *Smith v. Pacific Vinegar & P. Works*, 145 Cal. 352, 78 Pac. 550; *Booth v. Land Filling & I. Co.*, 68 N. J. Eq. 536, 59 Atl. 767. Where defendant and his associate purchased real estate through a syndicate for the purpose of selling it at a profit to plaintiff corporation to be formed, and after such formation, while acting as directors of plaintiff, authorized a sale of the property to it, in exchange for stock, at a price largely in excess of the value of the property, without making a full disclosure of all facts known to them material to the property and as to their purchase, including the price paid by them, or requiring that the corporation should have independent, adequate advice, the corporation was entitled to rescind the transaction for fraud. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479.

⁸²⁵ *Bent v. Priest*, 10 Mo. App. 543; *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388; *Spaulding v. North Milwaukee Town-Site Co.*, 106 Wis. 481, 81 N. W. 1064; *Goodhue Farmers' Warehouse Co. v. Davis*, 81 Minn. 210, 83 N. W. 531; *Gluckstein v. Barnes* [1900] App. Cas. 240; *The Telegraph v. Lee*, 125 Iowa, 17, 98 N. W. 364; *De Bardeleben v. Bessemer Land & I. Co.*, 140 Ala. 621, 37 South. 511. Cf. *Campbell's Case*, L. R. 4 Ch. D. 470. The president and general manager invented a gas tip, which the corporation manufactured under his orders as manager, without any contract with him. He directed an employé of the corporation to ascertain the exact cost of the manufacture, to which he added 150 per cent. profit, for which amount he sold the tips to himself under another name; and he placed the tips on the market at a price double that paid the corporation. The directors of the corporation had no knowledge of, and did not consent to, this arrangement. Held that, the president and manager being bound to devote his energies to the benefit of the corporation, the profits made by him on the resale of the tips belonged to the corporation, and that it was entitled to compel him to account therefor. *D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 288, 70 S. W. 808.

⁸²⁶ *Parker v. Nickerson*, 112 Mass. 195.

⁸²⁷ He cannot be included in counting a quorum. *Bassett v. Fairchild*, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611; *Parsons v. Tacoma Smelting & R. Co.*, 25 Wash. 492, 65 Pac. 765.

in his favor.⁸²⁸ Where the directors fix the compensation for their own services, either as directors or other officers, the transaction will be jealously scrutinized by the courts, and will be set aside, at the election of the corporation, unless it is shown to be fair and free from fraud.⁸²⁹ An officer or director, however, who has interests to protect, may in good faith purchase the property of a corporation at a public sale.⁸³⁰ An officer may purchase from third persons at a discount securities issued by the corporation unless he owes it a duty to discharge or buy them.⁸³¹

Extent of Personal Interest.

It can make no difference in the application of this principle that there are other parties to a contract or transaction with a corporation in which an officer is personally interested, who occupy no fiduciary relation to the corporation.⁸³² The doctrine applies, for instance, where a contract is made with a firm of which one of the directors is a member,⁸³³ or where it is with another corporation of which he is also a stockholder,⁸³⁴ or an officer.⁸³⁵ The rule has frequently been applied, for instance, where the directors of a railroad company enter into a contract for the construction of its road with a construction firm or corporation of which one or more of the directors are members.⁸³⁶ So the directors of one corporation cannot act for it, at least when their action is an essential factor in contracting with another corporation, of which they are also directors.⁸³⁷ It has been held that a contract

⁸²⁸ *Smith v. Association*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53.

⁸²⁹ *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854. See *Copeland v. Manufacturing Co.*, 47 Hun (N. Y.) 235; *Davis v. Railway Co. (C. C.)* 22 Fed. 883; *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412. Post, p. 518.

⁸³⁰ *Greenwood Ice & C. Co. v. Georgia Home Ins. Co.*, 72 Miss. 46, 17 South. 83; *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511. Contra, *Aldine Mfg. Co. v. Phillips*, 129 Mich. 240, 88 N. W. 632.

⁸³¹ *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; *McIntyre v. Ajax Min. Co.*, 28 Utah, 162, 77 Pac. 613; *Camden Safe D. & T. Co. v. Citizens' Ice & C. S. Co.*, (N. J. Ch.) 61 Atl. 529.

⁸³² *Munson v. Railway Co.*, 103 N. Y. 58, 8 N. E. 355.

⁸³³ *Aberdeen Ry. Co. v. Blakie*, 1 Macq. 461; *Sims v. Petaluma Gaslight Co.*, 131 Cal. 656, 63 Pac. 1011. Cf. *Costa Rica Ry. v. Forwood* [1900] 1 Ch. 756.

⁸³⁴ *Parker v. Nickerson*, 112 Mass. 195; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426. And see *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509; *Attalla Iron Ore Co. v. Virginia Iron, C. & C. Co.*, 111 Tenn. 527, 77 S. W. 774.

⁸³⁵ *Bear River Valley Orchard Co. v. Hanley*, 15 Utah, 506, 50 Pac. 611.

⁸³⁶ See *Thomas v. Railway Co. (C. C.)* 2 Fed. 877; *Id.*, 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; *Barr v. Railroad Co.*, 125 N. Y. 263, 26 N. E. 145; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426.

⁸³⁷ *Metropolitan T. & T. Co. v. Domestic T. & T. Co.*, 44 N. J. Eq. 568, 14 Atl. 907; *Pearson v. Railroad Co.*, 62 N. H. 537, 13 Am. St. Rep. 590; *Davis Provision Co. v. Fowler Bros.*, 47 N. Y. Supp. 205, 20 App. Div. 626, affirmed

between two corporations by their respective boards of directors is not invalid, or voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its board are also directors of the other company.³³⁸ But a stricter rule prevails in some jurisdictions.³³⁹

Where the Corporation is Represented by Other Agents.

Most courts hold that a director or other officer may legally contract with the corporation, if, in entering into the contract, the corporation is represented by other agents; that, for instance, a director, either alone or jointly with strangers, may sell property or lend money to the corporation, or make any other contract with it, if the contract is sanctioned by a majority of the board of directors, not including himself; and that the corporation will be bound if the transaction is fair, open, and free from fraud.³⁴⁰ "It cannot be maintained," said

163 N. Y. 580, 57 N. E. 1108; *McLeod v. Lincoln Medical College*, 69 Neb. 550, 96 N. W. 265, 98 N. W. 672. But see *Evansville Public H. Co. v. Bank of Commerce*, 144 Ind. 34, 42 N. E. 1097; *Salina Nat. Bank v. Prescott*, 60 Kan. 490, 57 Pac. 121.

³³⁸ *United States Rolling-Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380. See, also, *Jessup v. Illinois Cent. R. Co. (C. C.)* 43 Fed. 483; *Hagerstown Mfg. Co. v. Keedy*, 91 Md. 430, 46 Atl. 965; *Porter v. Lassen Co.*, 127 Cal. 261, 59 Pac. 563; *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

³³⁹ Post, p. 499.

³⁴⁰ 1 Mor. Priv. Corp. § 527; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Barr v. Plate-Glass Co.*, 6 C. C. A. 260, 57 Fed. 86; *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Louisville, N. A. & C. Ry. Co. v. Carson*, 151 Ill. 444, 38 N. E. 140; *Ten Eyck v. Railroad Co.*, 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633; *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461; *Gorder v. Canning Co.*, 86 Neb. 548, 54 N. W. 830; *Parker v. Nickerson*, 137 Mass. 487; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Ft. Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532; *Troy Min. Co. v. White*, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549; *Singer v. Salt Lake City Copper Mfg. Co.*, 17 Utah, 143, 53 Pac. 1024, 70 Am. St. Rep. 773; *Porter v. Lassen County Land & C. Co.*, 127 Cal. 261, 59 Pac. 563; *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 60 S. W. 206; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189. See, also, *Junkins v. Union School District*, 39 Me. 220. The fact that boards of directors of two mining corporations are appointed by a third corporation as a holding company of the majority of the stock of the mining corporations does not subject the government of the mining companies to a common control, so as to make directors of one of the mining companies, who are also directors of the holding company, common to each of the mining companies, where it is established that the directors of the two original companies, appointed by the holding company, are not mere "dummies," subject to the will of the directors of the holding company. *Pierce v. Old Dominion Copper M. & S. Co.*, 67 N. J. Eq. 399, 58 Atl. 319. Where a proposition to borrow money from certain directors of a corporation was carried by sufficient votes of other members of

Mr. Justice Miller in *Twin-Lick Oil Co. v. Marbury*,³⁴¹ "that any rule forbids one director among several from lending money to the corporation when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given." Even in such cases as these, however, it is well settled that the transaction will be jealously scrutinized by the courts, and set aside at the instance of the corporation, if the slightest fraud or unfairness appears.³⁴² And by the better opinion the burden is on the directors or other officers to show the good faith and fairness of the transaction.³⁴³

Some of the courts—the New York court among them—have adopted a more rigid rule, and hold that a contract entered into with a corporation, acting through its directors, by one or more of the directors, either alone or jointly with third persons, is voidable at the option of the corporation, though a majority of the directors who assent to the contract are not personally interested, and without regard to whether or not the transaction is fair and free from fraud.³⁴⁴ In these jurisdictions the law does not inquire whether the transaction was fair or unfair, but stops their inquiry as soon as the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at

the board of directors to render the same valid without the votes of the lending directors, the fact that such lending directors were present at the meeting and voted for the transaction did not invalidate the same. *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

³⁴¹ 91 U. S. 587, 23 L. Ed. 328. See, also, *Jones v. Hale*, 32 Or. 465, 52 Pac. 311; *Rylander v. Sheffield*, 108 Ga. 111, 34 S. E. 848; *Blake v. Ray*, 110 Ky. 531, 62 S. W. 531.

³⁴² *Thomas v. Railway Co.*, 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Hallam v. Hotel Co.*, 56 Iowa, 178, 9 N. W. 111; *Hubbard v. Investment Co. (C. C.)* 14 Fed. 675; *Meeker v. Iron Co. (C. C.)* 17 Fed. 48; *Patterson v. Portland S. & R. Works*, 35 Or. 96, 56 Pac. 407.

³⁴³ *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Ryan v. Williams (C. C.)* 100 Fed. 172; *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92.

³⁴⁴ *Aberdeen Ry. Co. v. Blakie*, 1 Macq. 461; *Munson v. Railway Co.*, 103 N. Y. 58, 8 N. E. 355; *Hoyle v. Railroad Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Pearson v. Railroad Corp.*, 62 N. H. 537, 13 Am. St. Rep. 590; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. Law, 505; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1. Cf. *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673. 53 Atl. 842.

the instance of the corporation, without asking whether there was fraud or not. As was said in a New York case,⁸⁴⁵ it prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It makes no difference in these jurisdictions that only one director is a party to the contract, and that there were a number of other directors who voted for the contract, and who were not personally interested.

Consent—Acquiescence and Laches of Corporation or Stockholders.

A contract between directors or other officers or agents of a corporation and the corporation, or a transaction with the corporation in which they are interested directly or indirectly, is not absolutely void, even where there is fraud, if it is within the powers of the corporation. It is simply voidable at the election of the corporation or its stockholders.⁸⁴⁷ To be binding on the corporation, it does not need ratification. It is binding until avoided. It follows that if the stockholders of the corporation, or a majority of them, where the transaction is one which they could have authorized, but not otherwise,⁸⁴⁸ assent to the contract, expressly or impliedly, by taking the benefit of it with knowledge of the facts, it becomes binding upon the corporation, and cannot afterwards be avoided.⁸⁴⁹ And such consent will be implied if the stockholders are guilty of laches in moving to avoid it. They must take steps to avoid it within a rea-

⁸⁴⁵ *Munson v. Railway Co.*, 103 N. Y. 58, 8 N. E. 355.

⁸⁴⁷ *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. 145; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Hoyle v. Railroad Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Salem Iron Co. v. Lake Superior Con. Iron Mines*, 112 Fed. 239, 50 C. C. A. 213; *Stanley v. Luse*, 36 Or. 25, 58 Pac. 75; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1; *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

⁸⁴⁸ For instance, the holders of a majority of the stock of a corporation could not, by their votes at a stockholders' meeting, lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose, and whose stock is exclusively owned by them, unless such lease is made in good faith, and is supported by an adequate consideration; otherwise, a fraud would thereby be committed on the minority stockholders. See *Meeker v. Iron Co. (C. C.)* 17 Fed. 48. As to the powers of the majority, see ante, p. 430.

⁸⁴⁹ *Barr v. Railroad Co.*, 125 N. Y. 263, 26 N. E. 145; *Louisville, N. A. & C. Ry. Co. v. Carson*, 151 Ill. 444, 38 N. E. 140; *Welch v. Bank*, 122 N. Y. 177, 25 N. E. 269; *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *Battelle v. Northwestern Cement & C. P. Co.*, 37 Minn. 89, 33 N. W. 327.

sonable time after they have knowledge of the circumstances.⁸⁵⁰ The rule that a contract between a director of a corporation and the corporation is voidable at the instance of the latter, or of its stockholders, clearly does not apply where all who are interested in the corporation, its officers, directors, and stockholders, not only know of but consent to it, and where the property acquired by the corporation under the contract is kept and used by it without dissent by any one.⁸⁵¹

Liability to Extent of Benefit.

Even where the contract is voidable, and is avoided by the corporation, it will be liable for the actual value of the benefits it has received. Thus, where two of the board of directors of a railroad company, who took part in making a contract for the construction of the road, were interested with the other parties in the contract, and the other contractors entered into an agreement with the other directors at the time the construction contract was made that, in effect, relieved them from liability on their unpaid stock, it was held that the contract was voidable at the election of the corporation or its stockholders, but that, to the extent of the benefit conferred upon the corporation in the construction of the road, the bonds issued in payment thereof were not void, and in a suit to foreclose a mortgage by which they were secured a decree for that amount should be allowed.⁸⁵²

⁸⁵⁰ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *United States Rolling-Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Stetson v. Northern Inv. Co.*, 104 Iowa, 393, 73 N. W. 869; *Cullen v. Coal Creek Mln. Co.* (Tenn. Ch.) 42 S. W. 693. And see *Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325; *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

⁸⁵¹ *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327. And see *Barr v. Glass Co.*, 6 C. C. A. 260, 57 Fed. 86, and *Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713.

⁸⁵² *Thomas v. Railroad Co.*, 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018. See, also, *Wardell v. Railroad Co.*, Fed. Cas. No. 17,164; *Griffith v. Blackwater Boom & L. Co.*, 46 W. Va. 56, 33 S. E. 125.

LIABILITY OF OFFICERS TO THE CORPORATION.

203. The directors and other officers of a corporation are liable to it for losses sustained.

- (a) **By reason of a willful abuse of their trust, as by exceeding their authority or the powers of the corporation, or by misapplication of the corporate funds.**
- (b) **By reason of gross negligence and inattention to the duties of their trust, though there may be no actual bad faith. By the weight of authority, they are bound to exercise ordinary care and prudence,—that is, the same degree of care and prudence that men ordinarily exercise under similar circumstances,—and failure to do so is gross negligence.**
- (c) **But they are not liable for accidents, thefts, etc., where they have not been negligent, nor for mere mistakes or errors of judgment, where they have acted in good faith and with ordinary care and diligence.**
- (d) **Nor are they liable for the acts or omissions of other directors or agents, where they have not themselves been guilty of neglect in supervising or appointing them. It is otherwise, however, if they participated in such acts, or negligently failed to take measures to prevent them.**

It is well settled that the directors, trustees, or other officers of a corporation, if they act in good faith within the limits of the powers conferred upon the corporation by the charter, and within their authority, and use proper prudence and diligence, are not responsible for losses resulting to the corporation from mere mistakes or errors of judgment.³⁵³ Thus, they are not liable for declaring and paying a dividend which diminishes the capital, in violation of a statute or of the common law, where they are not guilty of bad faith or negligence.³⁵⁴ Nor are they liable for losses from accident, theft, etc., where they have not been negligent.³⁵⁵

On the other hand, all the authorities agree that the directors or other officers of a corporation who willfully abuse their trust, or misapply the funds of the corporation, by which a loss is sustained, are personally liable, as trustees, to make good the loss.³⁵⁶ They

³⁵³ *Spring's Appeal*, 71 Pa. 11, 10 Am. Rep. 684, 1 Cumming, Cas. Priv. Corp. 790; *Watts' Appeal*, 78 Pa. 370; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Hodges v. Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Booth v. Dexter Steam Fire-E. Co.*, 118 Ala. 369, 24 South. 405.

³⁵⁴ *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Van Dyck v. McQuade*, 86 N. Y. 38; *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; *Dovey v. Cory* [1901] A. C. 477, 17 Times L. R. 732.

³⁵⁵ *Mowbray v. Antrim*, 123 Ind. 24, 23 N. E. 858.

³⁵⁶ *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; *Heath v. Railway Co.*, Fed. Cas. No. 6,306; *Perry v. Oil-Mill Co.*, 93 Ala. 364, 9 South. 217; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Horn Silver Min. Co. v. Ryan*, 42

are bound to observe the limits placed upon their powers in the charter and by-laws, and if they intentionally or negligently transcend those powers, and do ultra vires or unauthorized acts, they are liable for the damages.³⁵⁷ But they are not liable for violation of the charter through mistake, unless the mistake arose from the want of due care.³⁵⁸

And they are equally liable if they suffer the corporate funds or property to be lost or wasted by gross negligence, and inattention to the duties of their trust, though there is no bad faith.³⁵⁹ In a late Virginia case it appeared that the president of a savings bank misappropriated its funds and overdrew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely overdrew their accounts, and were loaned large sums by the bank, with little or no security, though such borrowers were irresponsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but once, twice, or three times a year, and never caused the books to be examined, nor called for statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but 10 per cent. on the deposits. Under these circumstances, it was held that, though the directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors.³⁶⁰

Minn. 196, 44 N. W. 56; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 195; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514.

³⁵⁷ *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Hodges v. Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

³⁵⁸ *Hodges v. Screw Co.*, supra; *Williams v. McDonald*, 37 N. J. Eq. 409; and cases hereafter cited.

³⁵⁹ *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; *Delano v. Case*, 17 Ill. App. 531; *Id.*, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609, 15 Am. Rep. 731; *President, etc., of Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 195; *Doe v. Northwestern Coal & F. Co. (C. C.)* 78 Fed. 62; and cases in the following notes.

³⁶⁰ *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84. Compare *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488; *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 682, 2 Cumming, Cas. Priv. Corp. 186, *Shep. Cas. Corp.* 200. In the case last cited, it was held (Harlan, Gray, Brewer, and Brown, JJ., dissenting) that where the affairs of a bank are managed by its president, who has the reputation of being trustworthy and efficient, and owns the

An officer of a corporation is not liable to it for doing ultra vires acts, and thereby causing a loss, if the acts were authorized by the corporation; and such authority is shown if it appears that the directors and stockholders knowingly acquiesced therein.⁸⁶¹ But the board of directors alone cannot authorize violation of his duty by an officer. Thus, it has been held by the supreme court of the United States that no act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the interests and rights of the stockholders, will justify the cashier in acts which are in violation of the stipulation in his official bond, well and truly to execute the duties of his office, or exempt him and his sureties from liability thereon.⁸⁶²

Directors of a corporation are not bound to exercise the highest degree of care and diligence,—such as a very vigilant or extremely careful person would exercise.⁸⁶³ If this were required, it would be difficult to find responsible persons to assume the duties of directors. It is sometimes declared that they are bound to exercise the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. "When," said the New York court, "one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—'crassa negligentia'—not to bestow them. It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the

greater part of the stock, and the bank is generally considered to be in a prosperous condition, directors cannot be held liable for losses through mismanagement on the ground of negligence, in that they did not, within 90 days after they became directors, compel the board of directors to make a thorough investigation of the books and condition of the bank. The duty of the board of directors is not discharged by merely selecting officers of good reputation for ability and integrity, and then leaving the affairs of the bank in their hands, without any other supervision or examination than mere inquiry of such officers, and relying upon their statements until some cause for suspicion attracts their attention. The board is bound to maintain a supervision of the bank's affairs, to have a general knowledge of the character of the business and the manner in which it is conducted, and to know at least on what security its large lines of credit are given. *Gibbons v. Anderson* (C. C.) 80 Fed. 345.

⁸⁶¹ *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170.

⁸⁶² *Minor v. Bank*, 1 Pet. (U. S.) 46, 7 L. Ed. 47.

⁸⁶³ *Briggs v. Spaulding*, *supra*.

care exercised in the management of a savings bank."³⁶⁴ It is generally said that directors and trustees are liable only for gross negligence,—"crassa negligentia,"—but, by the weight of opinion, that phrase means the absence of ordinary care and diligence under the circumstances of the particular case.³⁶⁵ There are some cases against this view of the law,—cases in which it seems to be held that directors will not be liable for losses resulting from their inattention to the duties confided to them unless their inattention was willful or fraudulent.³⁶⁶

³⁶⁴ *Hun v. Cary*, 82 N. Y. 65, 71, 37 Am. Rep. 546. See, also, *Warren v. Robison*, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 734; *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 54 Atl. 209, 96 Am. St. Rep. 239. In *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513, it was said: "I think the question in all such cases should and must necessarily be whether they [directors] have omitted that care which men of common prudence take of their own concerns. To require more would be adopting too rigid a rule, and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only, which is very little short of fraud itself."

³⁶⁵ *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684, 1 Cumming, Cas. Priv. Corp. 799; *Hodges v. Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *North Hudson Mut. Bldg. & Loan Ass'n v. Childs*, 82 Wis. 460, 52 N. W. 600, 605, 33 Am. St. Rep. 57; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56; *Swentzel v. Penn Bank*, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718; *Warner v. Penoyer*, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761; *Killen v. State Bank*, 106 Wis. 546, 82 N. W. 536; *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 292; *Dovey v. Cory* [1901] App. Cas. 477; *Johnson v. Stoughton Wagon Co.*, 118 Wis. 438, 95 N. W. 394; *David Reus Permanent Loan & I. Co. v. Conrad*, 101 Md. 224, 60 Atl. 737. In *Spering's Appeal*, supra, Judge Sharswood said: "They [directors] can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more." In *Swentzel v. Penn Bank*, supra, Paxson, J., said: "In *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684, the subject is very fully discussed by the late Justice Sharswood, and the rule of ordinary care is laid down. Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, from whom he receives no compensation."

³⁶⁶ See *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488; *Godbold v. Bank*, 11 Ala. 191, 46 Am. Dec. 211; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Ebelhar v. German American Security Co.'s Assignee* (Ky.) 91 S. W. 262.

The cases agree that directors cannot be held responsible for the acts or omissions of other directors or agents, unless they have been guilty of neglect in supervising or appointing them.³⁶⁷

SAME—REMEDIES AGAINST OFFICERS.

- 204. Where a loss results to a corporation by reason of the fraud, wrong, or negligence of its directors or other agents,**
- (a) The corporation may maintain**
 - (1) An action on the case at law to recover damages.**
 - (2) A suit in equity to compel them to account.**
 - (b) An individual stockholder in such a case**
 - (1) Cannot maintain an action at law, as the injury is to the corporation.**
 - (2) But he may sue in equity when, and only when, the directors cannot or will not institute the suit, and relief cannot be obtained by applying to a stockholders' meeting.**
 - (c) Creditors of the corporation, in case of insolvency, may enforce the liability to the corporation; and by statute, in a number of states, officers who are guilty of fraud or neglect are expressly made liable to creditors.**
- 205. The statute of limitations does not run against the claim of a corporation against its officers for misappropriation of corporate funds, since their relation is a fiduciary one.**

An action on the case by the corporation will lie against the directors or other officers of a corporation for wrongful acts or negli-

³⁶⁷ Directors "are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents." *Briggs v. Spaulding*, 141 U. S. 182, 11 Sup. Ct. 924, 929, 35 L. Ed. 662, 2 Cumming, Cas. Priv. Corp. 186; *Shep. Cas. Corp.* 200. See, also, *Warner v. Penoyer*, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761. A receiver of a national bank may sue the directors to hold them responsible for the malfeasance of the managing officer, when it appears that they were so negligent as to make practically no examination of its books or affairs, and to hold meetings only at rare intervals, and then to limit their business almost wholly to the election of directors and the declaration of dividends. In such case their liability for losses should begin at a time when they ceased to discharge the duty of giving proper supervision to the conduct of the bank's affairs. In the circumstances of the case, they were liable from the time when, by reason of the failure to earn dividends for more than a year, their attention should have been drawn to the necessity of making a thorough examination. *Gibbons v. Anderson* (C. C.) 80 Fed. 345. Where the by-laws provided that the general manager should have charge of all the company's property, and control of all persons in its employ, with power to discharge them at will, and that he should cause regular and accurate accounts to be kept by a competent book-

gence affecting the interests of the company.⁸⁶⁸ And a court of equity, in so far as the individual rights of the stockholders are concerned, has jurisdiction to call the directors to account for breach of trust, and to compel them to make satisfaction to the corporation for any loss sustained by it.⁸⁶⁹ Such a suit should ordinarily be brought by the corporation, for the injury is to it, and not by individual stockholders. But a stockholder, as we have seen, may maintain a suit in equity for the benefit of the corporation, where the directors cannot or will not institute the suit in the name of the corporation, and relief cannot be obtained by applying to a stockholders' meeting.⁸⁷⁰ An individual stockholder cannot maintain an action at law against the directors or other officers of the corporation for fraud or negligence resulting in loss of corporate property. There is, in the eye of the law, no privity or relation between the stockholders and directors. The directors are not the agents of the stockholders, but of the corporation, the legal entity; and therefore, at law, the corporation alone can sue for injuries to it.⁸⁷¹ If a corporation becomes insolvent, creditors may enforce in equity a liability of its officers to the corporation for fraud or neglect resulting in loss to the corporation.⁸⁷² In most states corporate officers are by statute ex-

keeper, he was liable for funds misappropriated by the bookkeeper. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.

⁸⁶⁸ *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56. Cf. *Dykman v. Keeney*, 154 N. Y. 483, 48 N. E. 894. Under a statute providing that for wrongs done to property, rights, or interests of another, for which an action might be maintained against the wrongdoer, an action may be brought, after his death, against his representatives, a bank, in an action against its president for negligent conduct, by which it sustained losses, may, after his death, revive and continue it against his executors. *Seventeenth Ward Bank v. Smith*, 73 N. Y. Supp. 648, 67 App. Div. 228.

⁸⁶⁹ *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Hodges v. Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Davis v. Hofer*, 38 Ore. 159, 63 Pac. 56; *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667.

⁸⁷⁰ *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56; *Greaves v. Gouge*, 69 N. Y. 154; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Hodges v. Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Heath v. Railway Co.*, 8 Blatchf. 347, Fed. Cas. No. 6,306; *Hersey v. Veazie*, 24 Me. 9, 41 Am. Dec. 364; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Pencille v. State Farmers' Mut. Ins. Co.*, 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 320; *Wineburgh v. United States Steam & S. R. A. Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 25 South. 1006; *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572.

⁸⁷¹ *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690.

⁸⁷² *Post*, p. 593.

pressly made liable to creditors of the corporation for certain delinquencies in the performance of their duties.³⁷³

Statute of Limitations.

The statute of limitations does not run against the claim of a corporation against its officers for misappropriation of corporate funds, since their relation to such funds is fiduciary.³⁷⁴

LIABILITY OF OFFICERS AND AGENTS ON CONTRACTS.

206. The liability of officers and agents upon contracts made by them on behalf of the corporation, both where they have authority, and where they have no authority at all, or exceed their authority, is the same as if they were contracting for a natural person.

The liability of officers and agents of a corporation on contracts entered into by them is the same as in the case of any other person assuming to act as agent for another. The questions that arise in this connection are not at all peculiar to the law of corporations, but depend entirely upon established principles of the law of agency. An agent of a corporation may enter into a contract without disclosing the fact that he is acting for the corporation. His liability in such a case is precisely the same as if he acted for an undisclosed natural principal. For the law on this subject, therefore, reference must be had to works on the law of agency.³⁷⁵

So where an officer or agent of a corporation enters into a contract for the corporation in excess of his authority, or where a person enters into a contract for a corporation without any authority at all, his liability is the same as if he were acting for a natural person,—neither greater nor less. It will be found, upon consulting the law of agency, which is applicable in this connection to corporations, that if a person contracts as agent on behalf of a principal who does not exist, or who cannot contract, or if he enters into a contract in excess of his authority, he is personally liable, in some form of action, to the other party. Whether he is liable ex contractu, or whether he is liable only in tort, is an unsettled question, and there is a conflict of opinion. Some of the courts hold that the agent in such a case is liable in contract if he acted in good faith, and in tort if he acted in bad faith. If he believed that he had authority which he did not have, he may be sued as upon an implied warranty of au-

³⁷³ Post, p. 597.

³⁷⁴ *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530. But see *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684; *Williams v. Halliard*, 38 N. J. Eq. 373; *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837.

³⁷⁵ See Tlf. Ag. 230 et seq. ✕

thority. This rule has often been applied to contracts by persons contracting for a corporation without authority, or in excess of authority.³⁷⁶ Thus, where the president of a corporation executed a written guaranty in the name of the company, but without authority, he was held individually liable on the guaranty, as upon an implied warranty of authority.³⁷⁷ So where a person, assuming to represent a foreign corporation doing business in a state without compliance with the statute prescribing the conditions upon which foreign corporations may do business, engaged the services of a person and purchased goods for the corporation, he was held personally liable therefor.³⁷⁸

Some courts have refused to recognize this doctrine of implied warranty of authority, and hold that the liability of an agent acting without authority, or in excess of authority, is in tort, whether he acted in bad faith or not. In these jurisdictions a person who assumes to contract for a corporation without authority, or in excess of authority, is personally liable, whether he acted in bad faith or not, but he is liable only in an action of tort.³⁷⁹ "If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort."³⁸⁰

³⁷⁶ *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846; *Nellegan v. Campbell*, 65 Hun, 622, 20 N. Y. Supp. 234; *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552; *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340.

³⁷⁷ *Nellegan v. Campbell*, 65 Hun, 622, 20 N. Y. Supp. 234.

³⁷⁸ *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552.

³⁷⁹ *Jefts v. York*, 10 Cush. (Mass.) 392; *Farmers' & Mechanics' Bank v. Colby*, 64 Cal. 352, 23 Pac. 118.

³⁸⁰ *Jefts v. York*, *supra*.

LIABILITY OF CORPORATION FOR TORTS OF OFFICERS AND AGENTS.

207. A corporation is generally liable for the torts of its officers, servants, and agents committed in the course of their employment, to the same extent as a natural person.

208. A corporation is liable for the fraud of its officer or agent in the course of his employment, and within the scope of his authority, actual or apparent, though, by reason of facts peculiarly within the knowledge of the officer or agent, the particular act is unauthorized.

209. As to whether a corporation is liable for torts committed by its agents in the performance of ultra vires acts, the courts do not agree. By the weight of authority, it is liable in such a case if it authorized the ultra vires acts, but not otherwise.

We have seen in a previous chapter that a corporation can be guilty of a tort.²⁸¹ Of course, a corporation, being impersonal, cannot personally commit a tort. It can act only through agents, but, like a natural person, it is liable for the torts of its agents. The general rule is that a corporation is liable for the wrongful acts of its servants and agents to the same extent, and only to the same extent, as a natural person is liable for the wrongful acts of his servants and agents. Most of the rules and principles are the same in both cases. If a corporation expressly authorizes a person to do a particular act, there would seem to be no question as to its liability. Thus, if a majority of the stockholders should, by vote, direct an agent to enter unlawfully upon the land of another, the corporation would clearly be liable in trespass. The difficulties arise in those cases where the authority of the agent is to be implied.

It is a general rule that a corporation, like a natural person, is liable for any act of its agent that is committed in the conduct of its business, and in the course of his employment. "A principal," said Mr. Justice Story, "is to be held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts, or disapproved of them. In all such cases the rule applies, respondeat superior, and is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the

²⁸¹ Ante, p. 193.

instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."³⁸² This statement of the rule applies to officers and agents of corporations.³⁸³

Some of the cases are very clear. For example, if an agent having authority to sell goods for a corporation should be guilty of false and fraudulent representations as to their quality, the corporation is clearly liable to an action for deceit. The fraud in such a case is, for all purposes, the fraud of the corporation, though it may not have authorized it, since it is committed by the agent in the course of his employment; that is, in selling goods.³⁸⁴ And so, generally, a corporation is liable for all frauds of its agents committed in the course of their employment.³⁸⁵ And, as we have seen in a former chapter, a corporation is liable for assault and battery, or other trespasses, for conversion, for libel, for malicious prosecution, or malicious attachment of goods, or for conspiracy, or for negligence, by or of its officers or agents, if committed in the course of their employment.³⁸⁶

The fact that an officer or agent acts without the scope of his actual authority, in committing a fraud, does not exempt the corporation from liability, if his act was apparently done in the course of his employment, and within the scope of the general authority conferred upon him. If an act is apparently within the scope of the general authority and employment of the agent, though, by reason of facts necessarily and peculiarly within his knowledge, it is unauthorized, the corporation is liable. Thus, where the secretary and treasurer of a corporation, who was also its agent for the transfer of stock and authorized to countersign and issue certificates of stock when signed by the president, forged the president's name to a certificate, and fraudulently issued it, the corporation was held liable to a bank which accepted the certificate, in good faith, as security

³⁸² Story, Ag. § 452.

³⁸³ Fifth Ave. Bank of New York v. Forty-Second St. & Grand St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. (U. S.) 207, 16 L. Ed. 73, 1 Cumming, Cas. Priv. Corp. 453; Denver & R. G. Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176, 2 Cumming, Cas. Priv. Corp. 107; State v. Morris & E. R. Co., 23 N. J. Law, 360.

³⁸⁴ Ante, p. 196. See 8 Am. Law Rev. 631.

³⁸⁵ New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 2 Cumming, Cas. Priv. Corp. 119; note, 347, infra. It is liable for the fraud of agents in procuring subscriptions to its stock. Ante, p. 277.

³⁸⁶ Ante, pp. 194-196, and cases there cited.

for a loan; and there are many other cases to substantially the same effect.³⁸⁷

If the transaction in which an officer or agent of a corporation commits a fraud is not even apparently within the scope of his authority, the corporation is not liable.³⁸⁸ And clearly a corporation cannot be held liable for the fraud of its president, who, in negotiating for a loan to himself individually, falsely represents that certificates of stock in the corporation, which he offers as collateral, are genuine.³⁸⁹ So, where a corporation delivers to the manager of its business surrendered certificates of stock containing blank indorsements, with directions to cancel them, and he transfers them to a purchaser in good faith, the title of the purchaser cannot be upheld, as against the corporation, on the ground of any implied agency on the part of the

³⁸⁷ *Fifth Ave. Bank of New York v. Forty-Second St. & Grand St. Ferry R. Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 83 Am. St. Rep. 712, 2 Cumming, Cas. Priv. Corp. 149. It was said in this case: "It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate apparently made in the course of his employment, as the agent of the company, and within the scope of the general authority conferred upon him; and the defendant is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them." See, also, *Griswold v. Haven*, 25 N. Y. 599, 82 Am. Dec. 380; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 2 Cumming, Cas. Priv. Corp. 119; *Titus v. Turnpike Road*, 61 N. Y. 237; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 199, 12 N. E. 433, 60 Am. Rep. 440; *Manhattan Beach Co. v. Harned* (C. C.) 27 Fed. 484; *Tome v. Railroad Co.*, 39 Md. 36, 17 Am. Rep. 540; *Shaw v. Mining Co.*, 13 Q. B. Div. 103; *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 425, 47 N. E. 249, 43 L. R. A. 777; *First Ave. Land Co. v. Parker*, 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779. Cf. *Moores v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385, 2 Cumming, Cas. Priv. Corp. 144; ante, p. 425, note 115; *Farrington v. Railroad Co.*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; *Hill v. Publishing Co.*, 154 Mass. 172, 28 N. E. 142, 13 L. R. A. 193, 26 Am. St. Rep. 230.

³⁸⁸ *Weckler v. Bank*, 42 Md. 581, 20 Am. Rep. 95, 2 Cumming, Cas. Priv. Corp. 104; *Shep. Cas. Corp.* 150.

³⁸⁹ *Manhattan Life Ins. Co. v. Forty-Second St. & G. St. Ferry R. Co.*, 64 Hun, 635, 19 N. Y. Supp. 90, affirmed 139 N. Y. 146, 34 N. E. 776; *Moores v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385, 2 Cumming, Cas. Priv. Corp. 144.

manager to transfer them. As was said in such a case: "If it can be said that the direction of the president to the manager to cancel the certificates made him the agent of the company for that purpose, it was an authority to destroy, and not to use. His act in abstracting them from the safe, and uttering them as valid certificates, had no relation to the authority conferred. It was not an act of the same kind as that which he was authorized to perform. He had no apparent authority to issue them as genuine certificates, for he had no authority to issue certificates for any purpose; and what he did was a willful and criminal act, perpetrated for private gain, and not connected with any official authority or semblance of authority, which he possessed as the defendant's agent."³⁹⁰ If the tort is committed by the agent in the course of his employment and in furtherance of it, the corporation cannot escape liability on the ground that it was not authorized, or even that it was expressly forbidden, and it can make no difference that the agents acts willfully and deliberately.³⁹¹ This rule is not peculiar to corporations. It is a well-settled principle of the general law of agency.³⁹² Thus, a railroad company has repeatedly been held liable for the act of its conductor in assaulting a passenger, and the rule has been applied to other employes.³⁹³ A railroad company has been held liable to a woman passenger for the tortious conduct of the conductor in kissing her.³⁹⁴

Ratification.

A corporation, like a natural principal, may become liable for torts of a person assuming to act for it, by ratifying his act, though the act was not authorized when it was committed. It will become liable by ratification if the act was done by such person assuming to act on its behalf, but not otherwise.³⁹⁵ "He that receiveth a trespasser, and

³⁹⁰ *Knox v. American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700.

³⁹¹ *Wheeler & W. Manuf'g Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

³⁹² See works on Agency, and on Torts.

³⁹³ *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Rounds v. Railroad Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *North Chicago City Ry. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481; *Southern Ex. Co. v. Platten*, 93 Fed. 936, 36 C. C. A. 46; *Malsenbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213.

³⁹⁴ *Craker v. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504.

³⁹⁵ *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314, 1 Cumming, Cas. Priv. Corp. 434; *Nims v. School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467.

agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his subsequent agreement amounteth to a commandment." ³⁹⁶ If the servant of a railroad company arrests and imprisons a passenger without authority, for nonpayment of his fare, his act is one which might be for the benefit of the company; and, if the company subsequently ratifies the act, it is liable in tort, should the act prove to have been unlawful. ³⁹⁷

Ultra Vires Transactions.

There is a wide difference of opinion, and much conflict and confusion in the decisions, as to the liability of a corporation for torts committed by its officers or agents in the performance of ultra vires acts, or in the course of ultra vires transactions. Some of the authorities hold broadly, that a corporation is not liable for the tortious conduct of its officers or agents in the course of an ultra vires transaction, as it cannot authorize ultra vires acts. Thus where the teller of a national bank, acting for it in selling railroad bonds, made false representations to induce a person to buy the bonds, it was held that the bank was not liable, as the sale of railroad bonds was not within the corporate powers of national banks. ³⁹⁸ And where the officers of an agricultural society authorized to hold agricultural fairs employed certain persons to convey persons to and from the fair grounds, and one of these persons negligently injured a third person, it was held that the corporation was not liable, as the employment was not within the powers of the corporation. ³⁹⁹ There are many other cases in which the same principle is laid down. ⁴⁰⁰

Many of these cases can be supported on the ground that the transaction was not authorized by the corporation, and that the tort, therefore, was not committed by the officer or agent within the scope of his employment. Thus, if, in the case above referred to, the officers of the agricultural society were not authorized by the corporation to employ persons to convey people to and from the fair grounds, they exceeded their authority in doing so, and for this reason, and not because the transaction was ultra vires of the corporation, the corporation could not be held liable. By the weight of authority, the principle does not go beyond this. And most of the courts hold that if a corporation, as distinguished from the officers and agents of the corporation, engages in an ultra vires transaction, it will be

³⁹⁶ 4 Inst. 317.

³⁹⁷ Eastern Counties Ry. Co. v. Broom, *supra*.

³⁹⁸ Weckler v. Bank, 42 Md. 581, 20 Am. Rep. 95, 2 Cumming, Cas. Priv. Corp. 104, Shep. Cas. Corp. 150.

³⁹⁹ Bathe v. Society, 73 Iowa, 11, 34 N. W. 484, 5 Am. St. Rep. 651. And see Hern v. Iowa State Agricultural Soc., 91 Iowa, 97, 58 N. W. 1092.

⁴⁰⁰ Gunn v. Railroad Co., 74 Ga. 509, 2 Cumming, Cas. Priv. Corp. 111.

liable for the frauds, negligence, or other torts of its agents in the course of that transaction; that a corporation has the power or capacity, as distinguished from the authority or right, to do ultra vires acts and to engage in ultra vires transactions; and that, if it does so, it cannot escape liability for torts committed in the course of such transactions merely on the plea of ultra vires. The question always narrows itself to this: Did the corporation authorize the transaction, or did it ratify the transaction, either expressly or impliedly? If it did, it is liable. Thus, where an educational corporation maintained a ferry, it was held liable for injuries to a passenger while being transported thereon, though the maintenance of the ferry by such a corporation was clearly ultra vires.⁴⁰¹ So, where railroad companies were operating their roads jointly under an ultra vires agreement, they were held liable for injuries to a passenger.⁴⁰² And a railroad company was held liable for the negligence of the driver of a stagecoach which it was running without the right to engage in business of that kind.⁴⁰³ So, where a bank which was accustomed to take deposits of United States bonds, with the knowledge and acquiescence of its directors, took such a deposit, and the bonds were lost through the gross carelessness of its agents, it was held liable for the loss, to the same extent as if the taking of the deposit had been authorized by its charter. "Corporations," it was said, "are liable for every

⁴⁰¹ *Nims v. School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467. The court said: "There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. * * * It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received and the expenses of it paid by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence."

⁴⁰² *Bissell v. Railroad Co.*, 22 N. Y. 258, 1 Cumming, Cas. Priv. Corp. 187.

⁴⁰³ *Buffett v. Railroad Co.*, 40 N. Y. 168. And see, to substantially the same effect, *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *New York, L. E. & W. Ry. Co. v. Haring*, 47 N. J. Law, 137, 54 Am. Rep. 123, 2 Cumming, Cas. Priv. Corp. 110; *Hutchinson v. Railroad Co.*, 6 Heisk. (Tenn.) 634. See, contra, cases in notes 398-400, supra.

wrong they commit, and in such cases the doctrine of ultra vires has no application.”⁴⁰⁴ Many other cases to the same effect may be found.⁴⁰⁵

LIABILITY OF OFFICERS AND AGENTS TO THIRD PERSONS FOR TORTS.

210. If the officers of a corporation, in transacting its business, are guilty of false and fraudulent representations, or other torts, whereby third persons are injured, they are personally liable.

It is well settled that, if the directors or other officers of a corporation commit frauds upon third persons in their transactions as officers of the company, they are personally liable to an action therefor, though the corporation also may be liable. Their liability does not depend upon their agency for the corporation. They are liable simply because they have been guilty of a tort. Thus, the directors of a corporation are personally liable to a third person for fraudulent representations whereby he was induced to contract with the corporation to his injury. There is no privity of contract between them and such person, but that can make no difference, for the action is not founded upon the contract at all, nor upon a breach thereof, but upon the personal tort of the directors.⁴⁰⁶ So a director or other officer of a corporation who knowingly issues or sanctions a false report or prospectus, containing untrue statements of material facts, the natural tend-

⁴⁰⁴ *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750. “This phrase” says Mr. Taylor, “contains endless ambiguities.” Taylor, *Priv. Corp.* § 337. “The question is not whether the wrongful act was ultra vires, any more than the question would be whether the act itself had been authorized by the corporation. The question is whether the employment or general transaction, in the course of which the tort was committed, was ultra vires; and, if this is answered in the affirmative, the corporation should not be held liable for the act, except on principles of acquiescence and ratification of the employment or transaction.” Id. § 338. Mr. Taylor refers to acquiescence and ratification on the part of stockholders, and perhaps creditors. It is difficult to escape the force of this statement. See *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Brokaw v. New Jersey R. & Transp. Co.*, 32 N. J. Law, 328, 90 Am. Dec. 659. The cases, however, speak of authorization and ratification by the corporation.

⁴⁰⁵ See *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176, 2 Cumming, Cas. *Priv. Corp.* 107; *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Id., 3 N. M. (Johns.) 109, 2 Pac. 369; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

⁴⁰⁶ *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432; *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84; *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121; *Zinn v. Mendel*, 9 W. Va. 580.

ency of which is to mislead and deceive the community, and to induce the public to purchase stock of the corporation, or to deal with it, is personally liable, in an action of deceit, to persons who purchase stock or deal with the corporation in reliance thereon, and are defrauded.⁴⁰⁷

To render the officers of a corporation liable to third persons for fraud, the case must come within the rules governing other cases of false representations. Therefore the representation must have been false. It must also have been fraudulent; that is, they must have known it to be false, or must have made it willfully, or in reckless disregard of whether it was true or false.⁴⁰⁸ The person seeking to hold them liable must have relied on the representation,⁴⁰⁹ and must have sustained injury in consequence thereof.⁴¹⁰

To render an officer or member of a corporation personally liable for torts committed in the conduct of its business, he must have personally taken part in the act, or knowingly acquiesced in it, when it was his duty to object and take steps to prevent it.⁴¹¹

⁴⁰⁷ *Morgan v. Skiddy*, 62 N. Y. 319. The publication by savings bank directors that the directors and stockholders are personally responsible for its debts does not constitute a contract with depositors, but, if intentionally false, affords the basis of an action of deceit. *Westervelt v. Demarest*, 46 N. J. Law, 37, 50 Am. Rep. 400; *Stickel v. Atwood*, 25 R. I. 456, 56 Atl. 687. Where directors of a national bank by their gross neglect permitted fraudulent statements of its condition to be published, they were liable to persons injured. *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

⁴⁰⁸ *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Arthur v. Griswold*, 55 N. Y. 400; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432; *Cole v. Cassidy*, 138 Mass. 487, 52 Am. Rep. 284; *Zinn v. Mendel*, 9 W. Va. 580; *Utle v. Hill*, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569; *Lyon v. James*, 97 App. Div. 385, 90 N. Y. Supp. 28, affirmed 181 N. Y. 512, 73 N. E. 1126. But see *Cassidy v. Uhlmann*, 170 N. Y. 505, 63 N. E. 554, where it was held that a bank director, who, after discovering the insolvency of the bank, permitted deposits to be received, without taking steps to close the bank, was liable to a subsequent depositor for fraud.

⁴⁰⁹ *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551.

⁴¹⁰ *Clark*, Cont. (2d Ed.) 220.

⁴¹¹ *People v. England*, 27 Hun (N. Y.) 139; *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087; *Libby v. Atchison, T. & S. F. R. Co.*, 69 Kan. 869, 77 Pac. 541. But see *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac. 358, 44 L. R. A. 508, 74 Am. St. Rep. 602; *Houston v. Thornton*, supra.

COMPENSATION OF OFFICERS.

211. An officer of a corporation, in the absence of express provision or agreement, is not entitled to compensation for performing the ordinary duties of his office; but he can recover, on an implied contract, the value of extraordinary services rendered at the request of the corporation. Express provision is usually made for the compensation of officers. An officer of a corporation cannot fix his own salary.

When a director or other officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover any compensation therefor, unless it has been so specially agreed. He cannot, in such a case, recover, on an implied contract, what the services were reasonably worth.⁴¹² And where an officer, who is also a director, without any agreement with the corporation, has voluntarily rendered services, it is beyond the power of the directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them.⁴¹³ But if an officer, at the request

⁴¹² *Citizens' Nat. Bank v. Elliott*, 55 Iowa, 104, 7 N. W. 470, 39 Am. Rep. 167; *American Cent. Ry. Co. v. Miles*, 52 Ill. 174; *Cheeney v. Railway Co.*, 68 Ill. 570, 18 Am. Rep. 584; *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170; *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655; *Schoening v. Schwenk*, 112 Iowa, 733, 84 N. W. 916; *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305; *Taussig v. St. Louis & K. R. Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674; *Grafner v. Pittsburg, N. I. & C. St. R. Co.*, 207 Pa. St. 217, 56 Atl. 426; *McConnell v. Combination Min. & Mill. Co.*, 30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703. "Directors of corporations, however, usually serve without wages or salary. They are generally financially interested in the success of the corporation they represent, and their service as directors secures its reward in the benefit which it confers upon the stock which they own. In other words, the custom is to pay the ordinary employes of corporations for the services they render; but it is the custom of directors of corporations to serve gratuitously, without compensation or the expectation of it. The presumption of law follows the custom. From the employment of an ordinary servant, the law implies a contract to pay him. From the service of a director, the implication is that he serves gratuitously. The latter presumption prevails, in the absence of an understanding or an agreement to the contrary, when directors are discharging the duties of other offices of the corporation to which they are chosen by the directory, such as those of president, secretary, and treasurer." *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335, 36 C. C. A. 370.

⁴¹³ *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Danville, H. & W. R. Co. v. Kase* (Pa.) 39 Atl. 301; *Ravenswood, S. & G. Ry. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285. And see *Beers v. New York Life Ins. Co.*, 66 Hun. 75, 20 N. Y. Supp. 788; *National Loan & Investment Co. v. Rockland Co.*, *supra*.

of the corporation, performs extraordinary services, not within the usual duties of his office, he may recover therefor without a special agreement. Thus, a director of a railroad company, who, at its request, rendered services as an attorney, and in procuring aid notes, right of way, etc., was held to be entitled to recover the reasonable value of such services, on an implied contract, as they were not embraced in his ordinary duties as director.⁴¹⁴ And if an officer, although he is also a director, renders his services under an agreement, express or implied, with the corporation, that he shall receive reasonable, but indefinite, compensation, it is not beyond the powers of the directors to fix and pay a reasonable salary to him after he has discharged the duties of his office.⁴¹⁵

Unless otherwise provided in the charter or by-laws of the corporation, the power to fix the salaries of the officers of the corporation vests in the board of directors. In doing so they must act in good faith, and for the benefit of the corporation. They have no authority to pay claims which the corporation is under no obligation to pay. Thus, they cannot pay an officer anything for past services, which have been rendered and paid for at a fixed salary previously agreed.⁴¹⁶ In some jurisdictions, as we have seen, if they fix their own salaries as officers, where they occupy other positions, such as that of president, secretary, etc., the transaction may be repudiated, at the election of the corporation, and this without regard to whether they acted in good faith or not.⁴¹⁷ In other jurisdictions, perhaps, in the absence of any provision in the charter or by-laws, they may fix their salaries as officers of the company, and the transaction will be sustained, if in perfect good faith and free from any suspicion of fraud or unfairness; but, if there is any bad faith or unfairness, their act will be set aside, at the election of the corporation.⁴¹⁸ An officer who is also a director

⁴¹⁴ *Ten Eyck v. Railroad Co.*, 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 638. And see *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U. S. 405, 14 Sup. Ct. 632, 38 L. Ed. 493; *Bassett v. Fairchild* (Cal.) 61 Pac. 791; *Brown v. Creston Ice Co.*, 113 Iowa, 615, 85 N. W. 750; *Bagley v. Carthage, W. & S. H. R. Co.*, 165 N. Y. 179, 58 N. E. 895; *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551; *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17.

⁴¹⁵ *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335, 36 C. C. A. 370. See, also, *Huffaker v. Krieger's Assignee*, 107 Ky. 200, 53 S. W. 288, 46 L. R. A. 384.

⁴¹⁶ *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854. See, also, *Harvard Brewing Co. v. Pratt*, 185 Mass. 406, 70 N. E. 435.

⁴¹⁷ Ante, p. 497.

⁴¹⁸ *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Harris v. Lemming-Harris Agricultural Works* (Tenn. Ch. App.) 43 S. W. 889. See, also, *Ft. Payne Rolling Mill Co. v. Hill*, 174 Mass. 224, 54 N. E. 532; *Davis v. Thomas*

is not qualified to vote at a meeting of the board on a resolution fixing his salary.⁴¹⁹

REMOVAL OF OFFICERS AND AGENTS.

212. The principal rules in regard to the removal of officers and agents of a corporation are these:

- (a) A corporation has a right to remove an officer or agent, where there is a contract for a fixed term, only where he violates his contract, or is incompetent. But it can at any time revoke the authority of an agent, rendering itself liable for breach of contract.
- (b) An officer or agent who is appointed by vote of the stockholders, or whose tenure is fixed by the charter, cannot be removed, nor his authority revoked, by the directors.
- (c) In some states, by express provision, the directors may remove their own appointees at pleasure, and they may do so without such a provision in the absence of a contract for a fixed time.
- (d) In some jurisdictions a court of equity will remove a director whose election is void, but, by the better opinion, the remedy is at law, by *quo warranto*, and a court of equity will grant relief only where it has acquired jurisdiction on some other ground.

Officers and agents of a corporation who do not hold their office under contract for a fixed time may be removed at pleasure by the corporation, or by the superior officer or officers who appointed them.⁴²⁰ But, if there is a contract for a fixed term between an officer and the corporation, he cannot be removed without cause, without rendering the corporation liable for breach of contract. In such a case, like any other employé, he may be removed for cause, as for breach of contract or incompetency. And it seems that a corporation, like any other principal, may at any time revoke the authority of its officer or agent, subject to liability for breach of contract.⁴²¹ If the tenure of a person to a corporate office is fixed by charter, and

A. Davis Co., 63 N. J. Eq. 572, 52 Atl. 717; Lillard v. Oil, Paint & Drug Co. (N. J. Ch.) 56 Atl. 254.

⁴¹⁹ Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Miner v. Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; Ravenswood, S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285; Adams v. Burke, 201 Ill. 395, 66 N. E. 235; Crichton v. Webb Press Co., 113 La. 167, 36 South. 926, 67 L. R. A. 76, 104 Am. St. Rep. 500; ante, p. 480. Cf. Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611.

⁴²⁰ 1 Thomp. Corp. §§ 802, 805; Mobile, J. & K. C. R. Co. v. Owen, 121 Ala. 505, 25 South. 612; In re A. A. Griffing Iron Co., 63 N. J. Law, 357, 46 Atl. 1097.

⁴²¹ 1 Thomp. Corp. § 805.

there is no provision for removal, there is no power to remove him until his term of office expires. If an officer is appointed by vote of the stockholders the directors have no implied authority to remove him.⁴²²

By the weight of authority, a court of equity will not primarily take jurisdiction to determine the legality of an election of directors, or to remove a director who is in possession of the office.⁴²³ The court will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and the grant of the relief depends upon its decision. If the right to the office only is in question, the remedy is at law, by quo warranto.⁴²⁴

RELATION BETWEEN OFFICERS AND STOCKHOLDERS.

213. The officers of a corporation are not the agents of the stockholders, but of the corporation; nor do they occupy a fiduciary relation towards the stockholders individually.

It is often said that the directors of a corporation are trustees of the stockholders, and that the relation of trustee and cestui que trust, with its consequences, exists between them, but they do not occupy any such relation towards the stockholders individually. They are simply the agents of the corporation. There is no privity, in law, between them and the stockholders. They are not the agents of the stockholders, but of the corporation,—of the legal entity. And, when it is said that they are trustees for the stockholders, it can only be meant that they occupy a fiduciary relation to the corporation, and that they are bound to act for the benefit of all the shareholders alike, and not for their own advantage, nor for the advantage of particular shareholders to the exclusion of others. "There is," said Chief Justice Shaw, "no legal privity, relation, or immediate connection between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank, on the other. The directors are not the bailees, the factors, agents, or trustees of such in-

⁴²² Id. § 804. As to removal of directors in general, see 10 Cyc. 742, et seq.

⁴²³ As to the grounds of removal, and the mode of exercising the power, see 1 Thomp. Corp. §§ 806-841.

⁴²⁴ *Perry v. Oil-Mill Co.*, 93 Ala. 364, 9 South. 217; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. 747; *Johnston v. Jones*, 23 N. J. Eq. 216; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17. But see *Wright v. Water Co.*, 67 Cal. 532, 8 Pac. 70, where it was held that a court of equity has jurisdiction of a bill to set aside an illegal election, though no other ground of jurisdiction exist.

dividual stockholders.”⁴²⁵ If they commit a breach of trust, the injury, in the eye of the law, is to the corporation, and primarily the corporation is the proper party to sue for redress. It is well settled that an action at law cannot be maintained by a stockholder against a director or other officer of the corporation for fraud, negligence, misapplication of funds, or other wrongs resulting in injury to the corporation. Such an action can only be maintained by the corporation, the injury being to it; and it can make no difference in such a case, that the value of the shares is diminished, and that the stockholder therefore individually suffers a loss.⁴²⁶ The directors of a bank, said the Connecticut court, in such a case, “are the agents of the bank. The bank is the only principal, and there is no such trust for or relation to a stockholder as has been claimed by the plaintiff. The entire duty of the directors, growing out of their agency, is owed to the bank, which, under the charter, is the sole representative of the stockholders, and the legal protector and defender of their property.”⁴²⁷ As we have seen, if the agents of the corporation will not or cannot sue for injuries to it, so that such injuries cannot be redressed through the corporate body, a court of equity will look behind the corporation, and recognize the stockholders, and will allow them to sue in their own names.⁴²⁸

An officer of a corporation occupies no fiduciary relation towards an individual stockholder, so as to impose upon him, in dealing with the stockholder as an individual, any duties which he would not owe to strangers. Thus, where the president of a corporation, who was also a director, having knowledge through his official position that the company's stock was worth more than its nominal market value, purchased stock from a stockholder for the market price, without disclosing to him the facts within his knowledge as to the real value, it was held that there was, in such transaction, no fiduciary relation between him and the stockholder, binding him to make such a disclosure, and that, in the absence of actual fraud, the purchase was valid.⁴²⁹ We have seen, however, that in proper cases the courts look

⁴²⁵ *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 792.

⁴²⁶ *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, 1 Cumming, Cas. Priv. Corp. 792; *Allen v. Curtis*, 26 Conn. 456.

⁴²⁷ *Allen v. Curtis*, *supra*.

⁴²⁸ *Ante*, p. 375.

⁴²⁹ *Board of Commissioners of Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245. To the same effect: *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. 426; *O'Nelle v. Ternes*, 32 Wash. 528, 73 Pac. 692. And see *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170.

behind the fiction of the corporate entity,⁴⁸⁰ and it is evident in the last analysis that the stockholder is the real party in interest in respect to the property of the corporation which is under control of the directors. In accordance with this view, in a recent well-considered case in Georgia, the court held that a director occupies toward the stockholders a fiduciary relation, imposing upon him, when purchasing the stock, the duty of disclosing to the stockholder material facts which are known to himself as director, and which, if generally known, would raise the value of the stock, and that concealment of such facts entitles the seller to rescind the sale as fraudulent.⁴⁸¹

⁴⁸⁰ Ante, p. 8.

⁴⁸¹ *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232. In this case a director bought shares from a stockholder at 110, concealing the fact that there was a contemplated sale of the entire plant, which made the stock worth 185. A director or managing officer of a corporation having a knowledge of the condition of its affairs, because of the trust relation and the superior opportunities afforded for acquiring information, before he can rightfully purchase the stock of one not actively engaged in the management, must inform him of the true condition of the affairs of the corporation. *Stewart v. Harris*, 69 Kan. 498, 77 Pac. 277, 66 L. R. A. 261, 105 Am. St. Rep. 178.

CHAPTER XIV.

RIGHTS AND REMEDIES OF CREDITORS.

- 214. Relation between Creditors and the Corporation—Remedies in General.
- 215. Property Subject to Execution.
- 216. Assets of a Corporation as a "Trust Fund" for Creditors.
- 217. Interference in Management of Corporation.
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- 219. Suits for Injunction and Receiver.
- 220. Assignment for Benefit of Creditors—Preferences.
- 221. Dissolution of Corporation.
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- 231. Who are Liable as Stockholders under the Statutes.
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- 234–236½. Remedies of Creditors against Stockholders.
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- 239. Statute of Limitations.
- 240. Set-Off by Stockholders.
- 241. Contribution among Stockholders.
- 242–243. Relation between Creditors and Officers.
- 244. Preferences to Officers Who are Creditors.
- 245. Statutory Liability of Officers.

RELATION BETWEEN CREDITORS AND THE CORPORATION— REMEDIES IN GENERAL.

214. Generally the creditors of a corporation have the same rights and remedies against the corporation and its property as if it were a natural person. Thus,
- (a) They may obtain judgment against it, and enforce the same
 - (1) At law, by execution against its property.
 - (2) In equity, by bill to subject equitable assets of the corporation, which cannot be reached by execution.
 - (b) They may proceed by attachment where by statute they may so proceed against a natural person.

As a general rule the rights and remedies of the creditors of a corporation against it are the same, both at law and in equity, as the rights and remedies of the creditors of a natural person are against him. They may sue the corporation at common law, and recover a judgment against it, and may enforce the judgment by execution

against the corporate assets.¹ Like creditors of a natural person, also, they may come into a court of equity and reach and subject equitable assets of the corporation to the satisfaction of their claims.² Creditors of a corporation may also attach the property of a corporation under the statutes, where the property of a natural person could be attached. A corporation is a "person," within the meaning of the attachment laws.³

SAME—PROPERTY SUBJECT TO EXECUTION.

215. The property of a corporation is subject to seizure and sale on execution against it, with this exception:

EXCEPTION—At common law neither the franchises of a corporation, nor property that is necessary to enable it to exercise its franchises, are subject to execution. This has been very generally changed by statute.

Ordinarily the property of a corporation may be seized on execution by its creditors to the same extent, and in the same manner, as the property of a natural person.⁴ But there are some exceptions. At common law the franchises of a corporation are not subject to seizure and sale upon execution.* Nor can lands, easements, or things essential to the existence of the corporation and the execution of a public corporate duty, and without which its franchise would be of no practical use, be levied upon and sold on execution at law, so as to detach them from the franchise, and thus destroy its use.⁵ Accordingly, where, upon an execution issued on a judgment recovered against a canal company, the marshal seized and advertised for sale a toll house and sundry canal locks, and other tangible property, an injunction was granted to prevent the sale; the court holding that, in the absence of a statute, neither the franchise of the company, nor any lands or works essential to the enjoyment of the franchise, and which could not be separated from it without destroying or impairing its value,

¹ As to what property is subject to execution, see section 215, *infra*.

² Post, pp. 535, 546, 549.

³ Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124; ante, p. 21.

⁴ Plymouth R. Co. v. Colwell, 39 Pa. 337, 80 Am. Dec. 526

⁵ State v. Turnpike Co., 65 N. J. Law, 73, 46 Atl. 569.

⁶ Louisville, N. A. & O. Ry. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Gue v. Canal Co., 24 How. (U. S.) 257, 16 L. Ed. 635; East Alabama Ry. Co. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136; Overton Bridge Co. v. Means, 33 Neb. 857, 51 N. W. 240, 29 Am. St. Rep. 514. Although the property of a private sanitation corporation was paid for by voluntary subscriptions of citizens, and its purpose was public, its property was subject to seizure by creditors. In re New Orleans A. Sanitary Ass'n, 105 La. 172, 29 South. 337, 83 Am. St. Rep. 230.

could be sold on execution.⁶ So it has been held as to the right of way of a railroad company.⁷ On the other hand, property of a public corporation which is not in actual use in the discharge of its public duty, or which is not essential to the performance of such duty, is not exempt.[†] Thus it is generally held that cars and rolling stock of a railroad corporation, not in actual use, are subject to seizure.[‡] In most jurisdictions the rule of the common law is changed by express statutory provisions.**

SAME—ASSETS OF A CORPORATION AS A "TRUST FUND" FOR CREDITORS.

216. The capital stock and assets of a corporation belong to it, and may be disposed of by it, if it does not violate its charter, as fully and as freely as if it were a natural person, subject only to the right of creditors to attack transactions as fraudulent. No direct trust attaches to its property in favor of its creditors.

In most of the text-books and in a great number of the cases, it is said broadly, and without qualification, that the capital stock and assets of a corporation constitute a "trust fund" for the payment of its creditors, and cannot be squandered or given away when necessary for the satisfaction of their claims.⁸ And it is also said (applying the equitable rule by which trust funds may be followed)⁹ that, if

⁶ *Gue v. Canal Co.*, *supra*.

⁷ *East Alabama Ry. Co. v. Doe*, *supra*; *McColgan v. Baltimore Belt R. Co.*, 85 Md. 519, 36 Atl. 1026.

[†] *Gardner v. Mobile & N. W. R. Co.*, 102 Ala. 635, 15 South. 271, 48 Am. St. Rep. 84; *Johnson Co. v. Miller*, 174 Pa. 605, 34 Atl. 316, 52 Am. St. Rep. 833.

[‡] *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 836; *Risdon Iron & L. Works v. Citizens' Traction Co.*, 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25 (cars and other movables of street railway company).

** See *Simmons v. Worthington*, 170 Mass. 203, 49 N. E. 114; *Williams v. East Wareham, O. B. & P. I. St. Ry. Co.*, 171 Mass. 61, 50 N. E. 646; *Philadelphia & B. C. R. Co.'s Appeal*, 70 Pa. 355; *Greensburg Fuel Co. v. Irwin Natural Gas Co.*, 162 Pa. 78, 29 Atl. 274; *Bell v. Wood*, 181 Pa. 175, 37 Atl. 201.

⁸ *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, 1 Cumming, Cas. Priv. Corp. 805; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 N. Y. 9; *Cole v. Iron Co.*, 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; *Nevitt v. Bank*, 6 Smedes & M. (Miss.) 513; *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539; *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *State v. Commercial State Bank*, 28 Neb. 677, 44 N. W. 998; *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133.

⁹ *Fetter*, Eq. 207-209.

this is done, the property may be followed in equity by the creditors of the corporation into the hands of any person other than a bona fide purchaser for value.¹⁰ Late decisions, however, and a careful consideration of most of the cases in which this dictum may be found, will show that in reality both the capital stock of a corporation and its other assets—so long, at least, as it is doing business—belong to the corporation itself, both in law and in equity, just as completely as does the property of a natural person belong to him, and they are not, in any true sense, held in trust for its creditors.*

The doctrine that the capital stock of a corporation is a trust fund for creditors was first laid down by Mr. Justice Story in *Wood v. Dummer*.¹¹ In this case a bank had distributed part of its capital stock among its stockholders, leaving debts unpaid, and nothing with which to pay them. It was said that the property so distributed was a trust fund for the payment of the debts of the corporation, and it was held that the creditors could follow it in equity into the hands of the stockholders. The doctrine was thus stated: "It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank, in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter; that is, as a fund

¹⁰ *Wood v. Dummer*, 8 Mason, 308, Fed. Cas. No. 17,944, 1 Cumming, Cas. Priv. Corp. 805; *Cole v. Iron Co.*, 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; *Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co.* (C. C.) 13 Fed. 516; *Montgomery Web Co. v. Dienelt*, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; *Vance v. Coke Co.*, 92 Tenn. 47, 20 S. W. 424; *Fisk v. Railroad Co.*, 10 Blatchf. 518, Fed. Cas. No. 4,830.

* *Hospes v. Northwestern Manuf'g & Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; *First Nat. Bank v. Dovetail Body & G. Co.*, 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31; *Butler v. Harrison Land & M. Co.*, 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464; *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; *Corey v. Wadsworth*, 118 Ala. 488, 25 South. 503, 44 L. R. A. 766; *Grand De Tour Plow Co. v. Rude Bros. Mfg. Co.*, 60 Kan. 145, 55 Pac. 848; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 227.

¹¹ 8 Mason, 308, Fed. Cas. No. 17,944, 1 Cumming, Cas. Priv. Corp. 805.

for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders, without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholder so diligently required? To me this point appears so plain, upon principles of law as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The billholders and other creditors have the first claims upon it, and the stockholders have no rights until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and cannot take any portion of the fund until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. On a dissolution of the corporation the billholders and the stockholders have each equitable claims, but those of the billholders possess, as I conceive, a prior, exclusive equity."

This is the decision and the dictum upon which the so-called trust-fund doctrine is based. But it requires no argument to show that the facts of the case did not render it necessary to hold the capital stock of a corporation a trust fund for creditors, in the strict sense of the term. All that the case decided was that a corporation cannot distribute its capital stock among its stockholders, and thereby leave creditors unpaid,—a transaction which is clearly a fraud upon existing creditors, just as a voluntary conveyance by a natural person is a fraud upon his existing creditors, who are thereby prevented from collecting their claims. So, if a corporation releases subscribers from liability to contribute to the capital stock, or distributes part of the capital stock to them, the transaction is a fraud upon subsequent creditors who are ignorant of the transaction, and deal with it on the faith of its capital stock being fully paid, and the transaction may be avoided by them on this ground. Many of the courts base the right of creditors to hold stockholders liable in these cases upon the ground that the capital stock is a trust fund for creditors. And it is in these cases, chiefly, that we find the trust-fund doctrine declared.¹² No such doctrine, however, is necessary. The stockholders are liable on the ground of fraud. Persons who deal with a cor-

¹² Such is the case in *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, 1 Cumming, Cas. Priv. Corp. 805; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 N. Y. 9; and in most of the other cases in which the doctrine is announced.

poration and become its creditors after such a transaction, and with knowledge of it, cannot complain, because they are not defrauded.¹³ If the capital stock were really a trust fund for creditors, they could complain.

Other cases in which the doctrine is announced, and seemingly relied upon, are cases in which the corporation has transferred its property to third persons in fraud of creditors.¹⁴ Thus, in *Cole v. Millerton Iron Co.*,¹⁵ a corporation had transferred all its property to another corporation, having the same officers and stockholders, pending an action against it, which afterwards resulted in a judgment. The only consideration for the transfer was the assumption by the grantee of the grantor's debts. The court, in holding the transfer illegal and void as against this judgment creditor, said, "The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against the stockholders and all transferees except those purchasing in good faith and for value." Clearly, it was unnecessary to resort to any trust-fund theory to sustain this decision.

The trust-fund doctrine has been virtually repudiated by the supreme court of Minnesota in the late case of *Hospes v. Northwestern Manuf'g & Car Co.*; ¹⁶ Judge Mitchell, one of the ablest jurists on the bench, delivering the opinion of the court. It was held that the capital stock of a corporation is its own property, which it may use and dispose of, if not prohibited by its charter, the same as a natural person; that it is not held in trust for creditors, except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of corporate debts; and that, as in the case of a natural person, any disposition of it in fraud of creditors is void. "The phrase," said Judge Mitchell, "that 'the capital of a corporation constitutes a trust fund for the benefit of creditors,' is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests,—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the cestui que trust, has the beneficial interest.

¹³ *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

¹⁴ *Sutton Manuf'g Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 496, Shep. Cas. Corp. 229.

¹⁵ 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615. See, also, *Hurd v. New York & S. O. Laundry Co.*, 167 N. Y. 89, 60 N. E. 327; *Grenell v. Detroit Gas Co.*, 112 Mich. 70, 70 N. W. 413; *Ewing v. Composite Shoe Brake Co.*, 169 Mass. 72, 47 N. E. 241. Cf. *Chase v. Michigan Tel. Co.*, 121 Mich. 631, 80 N. W. 717.

¹⁶ 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further."

In *Sanger v. Upton*,¹⁷ in the supreme court of the United States, it was said, in substance, as by Mr. Justice Story in *Wood v. Dummer*:¹⁸ "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn, or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation." This dictum is broad enough to imply that all the assets of a corporation constitute a trust fund, in the strict sense, for the payment of its debts, but it must be taken in connection with the facts before the court. Except as applied to them, it is mere dictum. In this case the assignee in bankruptcy of a corporation was seeking to compel stockholders to pay a balance due for their stock. It was merely an effort to reach debts due to the corporation,—equitable assets of the corporation,—and apply them in payment of its debts. There was no necessity at all to resort to any trust-fund doctrine. And the later decisions of the supreme court of the United States clearly show that they do not regard corporate assets as a trust fund for the payment of debts. Thus, it has been held that persons who become creditors of a corporation, with knowledge that its stock has not been paid in full, and that it was issued under an agreement by which the stockholders are not bound, as between them and the corporation, to pay

¹⁷ 91 U. S. 56, 23 L. Ed. 220.

¹⁸ 3 Mason, 808, Fed. Cas. No. 17,944, 1 Cumming, Cas. Priv. Corp. 805.

it in full, cannot compel further payments.¹⁹ The reason is that no fraud is committed upon them. If the capital stock were a trust fund for their benefit, they could compel payment in such a case. So it has been held that a conveyance of its property by a corporation cannot be questioned by those who subsequently deal with it.²⁰ Such rulings as these are inconsistent with the so-called trust-fund doctrine.

It may, perhaps, be said that the capital stock of a corporation is a trust fund for creditors who deal with it on the faith of its being full paid, and that it is on this ground that they may compel its payment notwithstanding any contrary agreement by the corporation. It is not necessary, however, to rest their right in this respect on any trust-fund theory, and to do so merely tends to confuse. Their right in such a case may well be rested on the ground of fraud. As was said by Judge Mitchell: "By putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation, and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having, and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity."²¹

In *Hollins v. Brierfield Coal & Iron Co.*,²² the supreme court of the United States virtually repudiate the so-called trust-fund doctrine. They say that, when it is said that the assets of a corporation constitute a trust fund for the benefit of creditors, it is not meant to convey the idea that there is any direct and express trust attached to the property of a corporation in favor of its creditors; that a corporation, as against creditors, is entitled to hold its property, if it does not violate its charter, as absolutely, and as free from the claims of or interference by its creditors, as an individual can hold his property; that

¹⁹ *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

²⁰ *Post*, p. 538.

²¹ *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

²² 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1118. And see *McDonald v. Williams*, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022.

all that is meant by the trust-fund doctrine is that, when a court of equity takes into its possession the assets of an insolvent corporation, it will administer them on the theory that they, in equity, belong to the creditors, if necessary in order to satisfy their claims, rather than to the corporation itself, or to its stockholders. "In other words,—and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation,—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as an individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder, who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, place the property in a condition of trust, first for the creditors, and then for the stockholder. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders, as against the corporation, in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." It was held in this case that the rule that simple-contract creditors cannot come into equity to obtain the seizure of their debtor's property, and its application to their claims, applies with the same force when the debtor is a corporation; and the rule is not changed by the insolvency of the corporation, its failure to collect in full all stock subscriptions, its execution of an illegal trust deed, or the pendency in the same court of a suit to foreclose the same, for neither of these things, nor all together, operates to charge upon the corporation's property any lien or direct trust in favor of simple-contract creditors.

SAME—INTERFERENCE IN MANAGEMENT OF CORPORATION.

217. The creditors of a corporation have no right, either at law or in equity, merely because they are creditors, to interfere in its management, or to come into a court of equity to restrain it from making contracts or disposing of its property, unless there is fraud or breach of trust to give a court of equity jurisdiction.

This rule seems to be well settled.²³ The property of a corporation, so long at least as it is doing business, belongs to it as fully as the

²³ See *Mills v. Buenos Ayres Co.*, 5 Ch. App. 621, 1 Cumming, Cas. Priv. Corp. 993; *Pond v. Railroad Co.*, 130 Mass. 194, 1 Cumming, Cas. Priv. Corp.

property of a natural person belongs to him, and, as a rule, it may make contracts and dispose of its property to the same extent as a natural person. If it makes conveyances or transfers of property on which creditors have a lien, or if it makes them, not in good faith, but with intent to hinder and delay its creditors, they may come into a court of equity, after obtaining judgment, and obtain relief by subjecting the property to the satisfaction of the judgment, just as the creditors of a natural person may do. Or, if the remedy is given by statute, they may proceed by attachment, and in that way secure their claim. But, in the absence of fraud or breach of trust, the creditors of a corporation cannot come into a court of equity and enjoin it from making a particular contract or conveyance on the ground that the transaction will prevent them from enforcing their claims. And it can make no difference that the transaction sought to be enjoined is alleged to be *ultra vires*, nor that the corporation is alleged to be insolvent.

In *Mills v. Northern Railway of Buenos Ayres Co.*,²⁴ it was held that creditors of a corporation could not come into a court of equity and enjoin the corporation from issuing debenture stock, and applying money raised thereon to the payment of dividends to shareholders, and from doing other acts claimed to be *ultra vires*. "So far," said Lord Hatherley, "as the case rests on the simple fact of the plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor, in that case, is to obtain his judgment and to take out execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, 'Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed, to see whether or not they are doing what is *ultra vires*, and to interfere, in order that, as by a bill *quia timet*, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment.' The case must have occurred, of course, many years ago, before joint-stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must

1005; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; *Tawas & B. C. R. Co. v. Iosco Circuit Judge*, 44 Mich. 479, 7 N. W. 65.

²⁴ 5 Ch. App. 621, 1 Cumming, Cas. Priv. Corp. 993.

have been many thousands; yet I have never before heard,—and I asked in vain for any such precedent,—of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands which he had not established in a court of justice, but which he was about to proceed to establish. If there is this power in any case, of course, it would apply, not only to the raising of money by debentures and to paying shareholders, but it would extend to an interference in every possible way with the dealings of the company.”

A similar decision was made by the Massachusetts court in *Pond v. Framingham & Lowell Railroad Co.*²⁵ The bill alleged that the plaintiffs were creditors of the defendant corporation; that it was insolvent; that all its property was mortgaged for the benefit of one class of its creditors; that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to the attaching creditor for 999 years, at a rental which would not pay the interest on its indebtedness; and that the lease would be injurious to its creditors and stockholders. The prayer was for an injunction to restrain it from further prosecuting its business and for a receiver. The court said: “The plaintiffs cannot maintain this bill, unless upon the ground that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegation of fraud or breach of trust or any other ground of jurisdiction which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs, as creditors, might, by an attachment, have obtained security which would take precedence of the contemplated lease; but, if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown. The allegation that the defendant corporation is insolvent does not aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation.”

²⁵ 130 Mass. 194, 1 Cumming, Cas. Priv. Corp. 1005. See, also, *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385, 24 South. 4.

SAME—FRAUDULENT CONVEYANCES AND TRANSFERS.

218. Conveyances and transfers of its property by a corporation with intent to hinder, delay, and defraud its creditors are invalid to the same extent, and on the same principles, as fraudulent conveyances and transfers by a natural person. As a rule,

- (a) They can be questioned, and the property reached, only by persons who were creditors at the time they were made.**
- (b) Before a creditor can come into equity to set them aside and subject the property to his claim, he must have recovered a judgment against the corporation, and issued execution thereon.**

If a corporation conveys or transfers its property fraudulently, with intent to hinder or delay creditors in the enforcement of their claims, they may come into a court of equity and set aside the transaction, as against any person other than a bona fide purchaser for value, and subject the property so disposed of to the satisfaction of their claims. They have such rights, and such rights only, in this respect, as creditors of a natural person would have under the same circumstances. The principles of law which govern are the same in both cases.²⁶

The stockholders of a corporation cannot transfer the corporate property to themselves, directly or indirectly, and so defeat the rights of creditors of the corporation. And they cannot do this by forming a new corporation in which they are the principal stockholders, and procuring a transfer to it of the property of the old company. Such a transfer is a fraud upon the creditors of the old company, and may be treated as void as to them, or the new corporation may be held liable for the debts of the old, to the extent of the property received by it.²⁷ But where a new corporation is formed, and purchases the as-

²⁶ *Graham v. Railroad Co.*, 102 U. S. 148, 26 L. Ed. 106, 1 Cumming, Cas. Priv. Corp. 1006; *Sutton Manuf'g Co. v. Hutchinson*, 11 O. C. A. 320, 63 Fed. 496, Shep. Cas. Corp. 229; *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333; *Hamilton v. Menominee Falls Q. Co.*, 106 Wis. 352, 81 N. W. 876.

²⁷ *Montgomery Webb Co. v. Dienelt*, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* (C. C.) 13 Fed. 516; *Vance v. Coke Co.*, 92 Tenn. 47, 20 S. W. 424; *Brum v. Insurance Co.* (C. C.) 16 Fed. 140; *Ewing v. Composite Brake Shoe Co.*, 169 Mass. 72, 47 N. E. 241; *Hurd v. New York & C. S. Laundry Co.*, 167 N. Y. 89, 60 N. E. 327; *Vicksburg & Y. Tel. Co. v. Citizens' Tel. Co.*, 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656; *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 878, 35 C. C. A. 639; *Wilson v. Aeolian Co.*, 64 App. Div. 337, 72 N. Y. Supp. 150, affirmed 170 N. Y. 618, 63 N. E. 1123; *Shadford v. Detroit, Y. & A. A. Ry.*, 130 Mich. 300, 89 N. W. 960; *Douglas Printing Co. v. Over*, 69 Neb. 320, 95 N. W. 656. And see, to the same effect, where the members of an embarrassed firm formed a corporation, and transferred to it the partnership property. *Booth v. Buhce*, 33 N. Y. 139, 88 Am. Dec. 372. Where a failing debtor forms a corporation,

sets of the old company, the new company cannot be made to satisfy a judgment recovered against the old company for a cause of action arising after the transfer.²⁸

Subsequent Creditors.

A conveyance made with intent to defraud persons to whom the grantor expects to become immediately or soon indebted may be attacked and avoided by such person in a proper case. But it is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, dispose of property for an inadequate consideration, or even make a voluntary conveyance of it, subsequent creditors cannot question the transaction, for they are not injured thereby. They are presumed to give credit to the debtor in the status which he has after the conveyance. In *Graham v. La Crosse & M. R. Co.*,²⁹ it was held that this principle applies to conveyances by a corporation; that the disposal by a corporation of any of its property cannot be questioned by subsequent creditors any more than a like disposition of property by an individual may be. It was contended in this case that a corporation debtor does not stand on the same footing as an individual debtor; that, while the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of the stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the cor-

composed of himself and members of his family, he taking substantially all the stock, and at once conveys all his property to the corporation in exchange for the stock by him taken; and immediately places all his stock, except one share, with certain of his creditors, who have knowledge of the facts, as collateral security to their claims, and, as president and general manager, retains control of the property, and manages it for his own use,—such a conveyance is a fraud on his other creditors, and may be set aside by a court at their suit, and the property administered for the benefit of all his creditors under the insolvent laws. *First Nat. Bank v. F. C. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834. And see *Reed Bros. Co. v. First Nat. Bank*, 46 Neb. 168, 64 N. W. 701. Cf. *Campbell v. Bank*, 49 Neb. 143, 68 N. W. 344; *Andres v. Morgan*, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712.

²⁸ *Gray v. Steamship Co.*, 115 U. S. 116, 5 Sup. Ct. 1166, 29 L. Ed. 309. See, also, *Chase v. Michigan Tel. Co.*, 121 Mich. 631, 80 N. W. 717; *Seaboard Air Line Ry. v. Leader*, 115 Ga. 702, 42 S. E. 38; *Anderson v. War Eagle Consol. M. Co.*, 8 Idaho, 789, 72 Pac. 671. But where a corporation, while a going concern, but without property enough to pay its debts, and when all believed that its continuance would bring financial success, executes a mortgage to its directors, sureties on its notes, to secure them and induce renewals and further advances, the mortgage is not invalid. *Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713.

²⁹ 102 U. S. 148, 26 L. Ed. 106, 1 Cumming, Cas. Priv. Corp. 1006.

porate duty. "We do not concur in this view," it was said. "It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights,—not adverse to the corporate interests, but coincident with them. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

Necessity for Judgment against the Corporation.

Before a creditor who has no lien on the property of his debtor can come into a court of equity to reach equitable assets of his debtor and subject them to the payment of his claim, he must obtain a judgment and issue execution thereon. He must, as a rule, do this before he can sue to set aside alleged fraudulent conveyances by his debtor and subject the property to the payment of his debt. This principle applies where a creditor of a corporation seeks to set aside conveyances or transfers by it on the ground that they are fraudulent as to him. It is only in the position of a judgment creditor that he can question them.⁸⁰ This rule is well settled in the federal courts, and, as to them, it is not affected by the fact that statutes may authorize such proceedings in the state courts by simple-contract creditors.⁸¹ It has lately been held by the supreme court of the United States that this rule is not changed either by the insolvency of the corporation, its failure to collect in full all stock subscriptions, its execution

⁸⁰ Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 713, 35 L. Ed. 358; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Smith v. Railroad Co., 99 U. S. 398, 25 L. Ed. 437; Tawas, etc., R. Co. v. Iosco Circuit Judge, 44 Mich. 479, 7 N. W. 65; Atlas Nat. Bank v. John Moran Packing Co., 138 Mo. 59, 39 S. W. 71.

⁸¹ Scott v. Neely, supra; Hollins v. Iron Co., supra.

of an illegal trust deed or mortgage, or the pendency of a suit to foreclose the mortgage; for neither of these things, nor all of them together, operate to charge any lien or direct trust in favor of simple-contract creditors.⁸²

SAME—SUITS FOR INJUNCTION AND RECEIVER.

219. Creditors who have recovered judgment against a corporation, and exhausted their legal remedy, and, in very exceptional cases, simple-contract creditors, may maintain a bill in equity to reach assets of an insolvent corporation which have been unlawfully diverted, and, if necessary, a receiver may be appointed. A court of equity may also restrain a threatened diversion of property in such a case.

We have just seen that, where the officers of an insolvent corporation have fraudulently and illegally diverted its property, creditors who have obtained judgments against the corporation, on which execution has been returned unsatisfied, may maintain a bill in equity to reach such property and subject it to the payment of their claims, as against any person who is not a bona fide purchaser for value. In such a suit, if necessary, the court may appoint a receiver to take charge of the corporate assets, collect debts due the corporation, and make distribution.⁸³ Jurisdiction in such a case is very generally conferred by statute. Where a receiver has been appointed, a creditor cannot maintain a suit to reach assets, unless the receiver refuses to sue.*

There are a number of cases in which it has been held, upon the theory that the assets of a corporation are a trust fund for the payment of its debts, that where the officers of a corporation are about to commit waste, or divert the assets of the corporation, when it is insolvent, and thereby cause irreparable loss to creditors, the creditors may come into a court of equity and obtain an injunction to restrain the threatened diversion and the appointment of a receiver, if this is necessary to control and secure the corporate property to the payment of its debts.⁸⁴ And it has been held that such a suit may be maintained by simple-contract creditors, where immediate action

⁸² Hollins v. Iron, *supra*.

⁸³ Turnbull v. Lumber Co., 55 Mich. 387, 21 N. W. 875.

* First Nat. Bank v. Dovetail Body & G. Co., 143 Ind. 534, 42 N. E. 924.

⁸⁴ 2 Mor. Priv. Corp. §§ 797-799; Conro v. Gray, 4 How. Prac. (N. Y.) 166; Covington Drawbridge Co. v. Shepherd, 21 How. (U. S.) 112, 16 L. Ed. 88; Gaylord v. Railroad Co., Fed. Cas. No. 5,284; Flisk v. Railroad Co., Id. 4,830; Irons v. Bank, Id. 7,068; Lothrop v. Stedman, 42 Conn. 588, Fed. Cas. No. 8,519.

is necessary.⁸⁵ It is not necessary to base the jurisdiction in such cases on the ground that the property of a corporation is a trust fund for creditors. It is enough that creditors are entitled to enforce their claims against it, and that they can only do so in the particular case by resort to a court of equity.†

A receiver should not be appointed on an ex parte application, without giving the defendants an opportunity of being heard;⁸⁶ but it may be done in an extraordinary case, where there is immediate danger of the assets being misappropriated or wasted.⁸⁷

SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

220. A corporation may make an assignment for the benefit of creditors, and by the weight of authority, in the absence of express statutory prohibition, it may prefer certain creditors. In many jurisdictions preferences after insolvency are prohibited by statute.

A corporation, like a natural person, may make an assignment of its property for the benefit of its creditors.⁸⁸ And this may be done by the board of directors, who are intrusted with the general management of the corporation, without a vote of the stockholders.⁸⁹

In a number of states it is held that, when a corporation becomes insolvent and ceases to carry on business, its property and assets constitute a trust fund for the benefit of all its creditors, and the officers in possession of the property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all. And it is therefore held in these states that the officers of a corporation which has become insolvent and ceased to do business cannot prefer certain creditors over others, either by mortgage, provision in an assignment for the benefit of creditors, or otherwise.⁹⁰ By the

⁸⁵ See cases above cited.

† See *Kearns v. Leaf*, *Adelbert v. Kearns*, 1 Hem. & M. 681; *Evans v. Coventry*, 5 De G., M. & G. 911; *Foster v. Borax Co.*, 80 L. T. (N. S.) 461, 687.

⁸⁶ *Cook v. Railroad Co.*, 45 Mich. 453, 8 N. W. 74.

⁸⁷ *Turnbull v. Lumber Co.*, 55 Mich. 887, 21 N. W. 875.

⁸⁸ *State v. Commercial Bank of Manchester*, 13 Smedes & M. (Miss.) 569, 58 Am. Dec. 106; *Chamberlain v. Bromberg*, 83 Ala. 576, 3 South. 434; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 515; *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645; and cases hereafter referred to.

⁸⁹ Ante, p. 472.

⁹⁰ *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 878, 15 Am. St. Rep. 644; *Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co.*, 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802, *Shep. Cas. Corp.* 235; *Thompson v. Lumber*

solution there is no one, in law, to sue or be sued.⁴⁴ This rule, however, does not obtain in equity. A court of equity will recognize and enforce debts due to the corporation, and will lay hold of and apply its assets to the payment of its debts.⁴⁵

The dissolution of a corporation, as we have seen, in pursuance of charter or statutory authority, cannot be objected to by creditors as an impairment of the obligation of their contract with it; for the obligation of the contract survives, and the creditors may thus enforce their claims against any property belonging to the corporation which has not passed into the hands of bona fide purchasers.⁴⁶

SAME—CONSOLIDATION OF CORPORATIONS.

222. In most jurisdictions, where corporations are consolidated, the new corporation, in acquiring the rights and property of the old corporations, impliedly assumes their debts. It is generally so provided by statute.

It is an open question in some jurisdictions whether or not, in the absence of a statute,* where corporations are consolidated the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corporation; but, by the weight of authority, the question should be answered in the affirmative. The act of consolidation involves an implied assumption by the new company of all the valid debts and liabilities of the old companies, at least to the extent of the property acquired from them. "The rule which the authorities support seems to be that where one corporation goes entirely out of existence, by being incorporated into another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist the corporation into which it is merged will succeed to all its property, and be answerable for all

⁴⁴ Ante, p. 246.

⁴⁵ *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

⁴⁶ Ante, p. 205; *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. Ed. 945. 1 *Cumming, Cas. Priv. Corp.* 459. And see *Smith v. Canal Co.*, 14 Pet. (U. S.) 45, 10 L. Ed. 847. Equity will not enjoin the stockholders of a corporation from dissolving it, in the absence of fraud, at the suit of attaching creditors. *Cleveland City F. L. Co. v. Taylor Bros. L. Co.* (C. C.) 54 Fed. 85.

* Frequently liability for the debts of the old company is imposed by statute. See *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; *Welch v. First Div. St. Paul & P. R. Co.*, 25 Minn. 314; *In re Utica Nat. Brewing Co.*, 154 N. Y. 268, 48 N. E. 521.

its liabilities." ⁴⁷ The new company is liable for the torts of the old companies.†

SAME—EXTENSION OF CHARTER—NEW CORPORATION.

223. If the charter of a corporation is merely extended, it remains liable, as before, for its debts. But if, when a charter is about to expire, a new corporation is created, though with the same name and the same members, it is not liable for the debts of the old, except to the extent of property received by it from the old without consideration.

We have seen, in a preceding chapter, that if, when the charter of a corporation is about to expire, a new corporation is created, though with the same name and the same members as those of the old corporation, the new corporation is not liable for the debts of the old.⁴⁸ It is otherwise, of course, if the existence of the old corporation is merely extended, the identity of the corporation not being changed.⁴⁹ And, as we have seen, if the stockholders of a corporation form a new corporation, and transfer to it the property of the old corporation, the transfer is fraudulent as to the creditors of the old corporation, and they may hold the new one liable to the extent of the property so received by it.⁵⁰ But one corporation may, under some circumstances, succeed to the franchises and property of another without becoming

⁴⁷ Louisville, N. A. & C. Ry. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 8 L. R. A. 435. See Indianapolis, C. & L. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654; Thompson v. Abbott, 61 Mo. 176; Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699; Pullman's Palace Car Co. v. Missouri Pac. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; Tompkins v. Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992; Cleveland, O., C. & St. L. Ry. Co. v. Previtt, 134 Ind. 557, 33 N. E. 367; United States Capsule Co. v. Isaacs, 23 Ind. App. 523, 55 N. E. 832; Morrison v. American Snuff Co., 79 Miss. 330, 30 South. 723, 89 Am. St. Rep. 598; Camden Interstate Ry. Co. v. Lee, 27 Ky. Law Rep. 75, 84 S. W. 332. Cf. Parkinson v. West End St. Ry. Co., 173 Mass. 446, 53 N. E. 891. In an action against a corporation it is a defense that it was consolidated with another before commencement of the action, unless separate existence of the constituent companies is preserved by legislative enactment. Copp v. Colorado Coal & I. Co. (Sup.) 60 N. Y. Supp. 293.

† Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; Louisville, E. & St. L. Con. R. Co. v. Summers, 131 Ind. 241, 30 N. E. 873; Berry v. Kansas City, Ft. S. & M. R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371; McWilliams v. City of New York (D. C.) 134 Fed. 1015; Louisville & N. R. Co. v. Biddell, 112 Ky. 494, 68 S. W. 84. Contra, Von Cotzhausen v. Johns Mfg. Co., 100 Wis. 473, 76 N. W. 622.

⁴⁸ Bellows v. Hallowell, 2 Mason, 31, Fed. Cas. No. 1,279; ante, p. 73.

⁴⁹ Bellows v. Hallowell, supra; President, etc., v. Richardson, 1 Greenl. (Me.) 79, 10 Am. Dec. 34.

⁵⁰ Ante, p. 535.

responsible for its liabilities. Thus, where a statute empowers a railroad corporation to mortgage its franchises and property, and authorizes the purchasers at a mortgage sale to organize anew and be invested with all the rights and powers of the old company, the company so organized does not become liable to pay the debts of the old company.†

SAME—SET-OFF BY DEBTOR OF CORPORATION.

224. A debtor of a corporation, who is also a creditor, may set off his claim against his indebtedness, as against other creditors. But this rule does not apply to a stockholder who is indebted on account of his stock.

If a creditor of a corporation is also a stockholder, he cannot, when sued upon his subscription by or for creditors, set off the debt due him from the corporation, but must pay his subscription, and then share ratably with other creditors in the assets.⁵¹ This does not apply to other cases. If a person who is indebted to a corporation otherwise than for stock is also a creditor, he may set off his demand when sued on his indebtedness for the benefit of creditors.⁵² Thus, though claims for losses by fire due from an insurance company cannot be set off by the assured against notes given by him for the capital stock of the company, such claim can be set off by the assured against a claim by the company for moneys deposited with him as a private banker.⁵³ A person who holds property in trust for the corporation cannot, when sued therefor after an assignment for the benefit of creditors, set off a debt due him from the corporation⁵⁴ —

† *Vilas v. Milwaukee & P. du C. R. Co.*, 17 Wis. 497. See, also, *National F. & P. Works v. Oconto City Water Supply Co.*, 105 Wis. 48, 81 N. W. 125; *Hoard v. Railway Co.*, 123 U. S. 222, 8 Sup. Ct. 74, 31 L. Ed. 130; *Cook v. Railroad Co.*, 43 Mich. 349, 5 N. W. 390.

⁵¹ Post, p. 591.

⁵² *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, *Shep. Cas. Corp.* 50.

⁵³ *Scammon v. Kimball*, *supra*.

⁵⁴ Thus, where money is placed by a corporation in the hands of its general manager, as trustee, for safe-keeping, and to be paid out in the ordinary course of its business, he cannot set off a debt due to him by the corporation against the money in his hands, after an assignment by the corporation for the benefit of creditors. *First Nat. Bank v. E. T. Barnum Wire & Iron Works*, 58 Mich. 124, 315, 24 N. W. 543, 25 N. W. 202, 55 Am. Rep. 680. See, also, *Oregon Gold Min. Co. v. Schmidt*, 60 S. W. 530, 22 Ky. Law Rep. 1330.

RELATION BETWEEN CREDITORS AND STOCKHOLDERS.

- 225. Stockholders are not liable at all to creditors of the corporation, at common law,**
- (a) Unless they are indebted to the corporation on account of their stock, and payment of the debt is necessary for the payment of creditors.**
 - (b) Or unless the capital stock of the corporation, or a part of it, has been unlawfully distributed or paid out to them, directly or indirectly, leaving creditors unpaid.**
- 226. In most states, constitutional provisions have been adopted, or statutes enacted, making stockholders individually liable, to a greater or less extent, for corporate debts.**

One of the characteristics of a corporation, at common law, distinguishing it from a partnership, is the exemption of the members from liability for the debts of the corporation beyond the proportions of the capital stock owned by them. Partners are individually liable, as joint contractors, for all the debts of the firm, but it is otherwise with members of a corporation. If they have not paid the full amount of their subscriptions, and the corporation becomes insolvent, their liability to the corporation may be enforced by, or for the benefit of, creditors. But beyond the balance thus due from them to the corporation, and the amount paid in by them, they are under no liability to creditors, at common law, however insolvent the corporation may be. Creditors must look to the assets of the company, and, if the assets are insufficient to pay the debts in full, they must suffer the loss.

The only way in which liability can be imposed upon stockholders, as such, for corporate debts, is by the charter, or by statute.⁵⁵ When neither the charter of a corporation nor any general statute imposes on the individual members any personal liability to pay its debts, such liability cannot be imposed by a by-law of the corporation.⁵⁶ And the fact that individual members may have represented to the public that they were so liable will not make them liable as stockholders. If they have incurred liability as individuals disconnected with their corporate capacity, they should be proceeded against in their individual capacity, and not in their capacity as stockholders.⁵⁷

⁵⁵ Post, p. 550. See *Duluth Club v. McDonald*, 74 Minn. 254, 76 N. W. 1128, 73 Am. St. Rep. 344; *Enterprise Ditch Co. v. Moffit*, 58 Neb. 642, 79 N. W. 560, 45 L. R. A. 647, 76 Am. St. Rep. 122; *Redkey Citizens' Natural Gas, etc., Co. v. Orr*, 27 Ind. App. 1, 60 N. E. 716.

⁵⁶ *Reid v. Manufacturing Co.*, 40 Ga. 98, 2 Am. Rep. 563; *Trustees v. Flint*, 13 Metc. (Mass.) 539; *Carr v. Iglehart*, 3 Ohio St. 457.

⁵⁷ *Reid Manufacturing Co.*, supra.

Liability on Subscriptions.

The liability of a stockholder to pay the amount of his subscription to the capital stock of the corporation is part of the capital stock, and therefore it forms a part of the assets to which creditors of the corporation are entitled to look for the payment of their debts. Whenever, therefore, a stockholder is indebted to the corporation on his subscription, the debt may be enforced by, or for the benefit of, creditors, in an appropriate action. This is well settled.⁵⁸ A corporation cannot defeat the rights of creditors to hold the stockholders liable on their unpaid subscriptions by a dissolution.⁵⁹

Conditional Subscriptions.

Where a subscription is made upon a valid condition precedent, the subscriber, as we have seen, does not become a stockholder, nor incur any liability to the corporation, until the condition is fulfilled. Nor, until then, assuming that the condition is valid, does he incur any liability on his subscription to creditors of the corporation.⁶⁰ If a conditional subscription is unauthorized and invalid, because made prior to organization under a statute requiring a certain amount of stock to be subscribed,⁶¹ it is held by some courts that the subscription is void, so that it imposes no liability either to the corporation or to creditors.⁶² Others hold that the condition only is void, and that the subscription may be treated as absolute and unconditional, so that the subscriber would be liable thereon to creditors.⁶³

It must be remembered that performance of a condition precedent may be waived. It may be waived impliedly as well as expressly, and the waiver may be relied upon by creditors. A subscriber, therefore, who waives performance of a condition by acting as a stockholder, with knowledge that it has not been performed, cannot set up the condition to defeat liability to creditors on his subscription.⁶⁴

As we have seen, there is an implied condition that the whole amount of stock specified in the charter, articles of association, or

⁵⁸ Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Allen v. Railroad Co., 11 Ala. 437; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Insurance Co., 22 How. (U. S.) 380, 16 L. Ed. 349, 1 Cumming, Cas. Priv. Corp. 814; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Briggs v. Peniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Bissit v. Navigation Co. (C. C.) 15 Fed. 353; World's Fair Excursion & Transp. Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Germantown Pass. Ry. Co. v. Fittler, 60 Pa. 124, 100 Am. Dec. 546; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; Nevitt v. Bank, 6 Smedes & M. (Miss.) 513.

⁵⁹ Germantown Pass. Ry. Co. v. Fittler, 60 Pa. 124, 100 Am. Dec. 546.

⁶⁰ Ante, p. 287.

⁶¹ Ante, p. 303.

⁶² Ante, p. 292.

⁶³ Ante, p. 292.

⁶⁴ Ante, p. 292; Cornell's Appeal, 114 Pa. 153, 6 Atl. 258; Mack's Appeal (Pa.) 7 Atl. 481.

contract of subscription, or fixed by the incorporators or directors when authorized to settle the same, shall be taken by bona fide, binding, and unconditional subscriptions, before the subscribers shall be liable on their subscriptions, unless the implication is rebutted.⁶⁵ This, like other conditions, may be waived.⁶⁶

Subscriptions upon Special Terms.

We have considered subscriptions upon special terms in a preceding chapter. And we have seen that a corporation cannot make special terms with a subscriber by which it releases him from liability to pay his subscription, in whole or in part.⁶⁷ An agreement between a corporation and a subscriber by which the subscription is not to be payable, or is to be payable in part only, though it may be binding upon the corporation and upon the other stockholders, by their consenting to it, is void as against creditors of the corporation who contracted with it on the faith of its capital stock being fully paid. And the subscription may be enforced in full for the benefit of creditors.⁶⁸

Release of Subscriber by Corporation.

A subscriber may be released, in whole or in part, from his contract by the corporation, with the consent of the other stockholders, provided no claims of creditors intervene; but he cannot be released if the amount due from him is required to pay the debts of the corporation.⁶⁹ And if a subscriber is sued by a creditor or receiver of the corporation, on his subscription, and claims in defense that the number of his shares was reduced with the consent of the corporation and the other subscribers, it is incumbent upon him to show that it was at a time when it might lawfully be done.⁷⁰

"Watered" and "Bonus" Stock.

Difficult questions arise in regard to the liability to creditors of the corporation where stock is issued gratuitously, or under an agreement by which the holder pays less than the par value, either in money or property. We have already considered this subject at length in a preceding chapter, and it is not necessary to go into it again. We have seen that the following propositions are supported by the

⁶⁵ Ante, p. 299.

⁶⁶ Note 64, supra.

⁶⁷ Ante, p. 294. †

⁶⁸ Ante, p. 296, and cases there collected. See, particularly, *Burke v. Smith*, 16 Wall. (U. S.) 390, 21 L. Ed. 361; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, 1 Cumming, Cas. Priv. Corp. 824.

⁶⁹ *World's Fair Excursion & Transp. Boat Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724; ante, p. 818, and cases there cited.

⁷⁰ *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

weight of authority, though on most of them there is some conflict of opinion:

(1) The transaction may be valid and binding as far as the corporation and the stockholders are concerned, but the fact that it is so does not necessarily render it binding upon creditors of the corporation.⁷¹

(2) If the stock is original stock, issued on subscription, any agreement between the corporation and a subscriber, by which he pays less than its par value, is a fraud upon creditors of the corporation, who deal with it on the faith of the stock being full paid, and, if the corporation becomes insolvent, the original holders of such stock, and purchasers with notice, may be held liable for its full par value for the payment of creditors.⁷²

(3) When the corporation is an active and going concern, it may issue stock at its market value, instead of its par value, either in payment of a debt, or to raise money or purchase property necessary for carrying on its business; and if the stock is issued as full paid, and the transaction is in good faith, the holders of the stock will not be liable to creditors.⁷³

(4) If stock is issued as a bonus, and without consideration, the holders will be liable for the par value of the stock to creditors who deal with the corporation on the faith of the stock being full paid. The contrary is held in New York.⁷⁴

(5) In any case, only those creditors who have dealt with the corporation on the faith of the stock being full paid can complain. Therefore the holders of stock issued as full paid, without being paid in fact, are not liable (a) to persons who became creditors before the stock was issued, (b) or who became creditors with knowledge of the facts.⁷⁵

(6) In the absence of constitutional or statutory prohibition, stock may be paid for in property or services, if they are such as the corporation has the power to purchase or engage; and, by the weight of authority, the transaction will be valid as against creditors, if it was free from fraud, though the property may in fact have been worth less than the stock. If the overvaluation is intentional the transaction is fraudulent, as a matter of law; and obvious and gross overvaluation, if unexplained, is conclusive evidence of intentional overvaluation.⁷⁶

(7) These rules are to some extent inapplicable under peculiar constitutional or statutory provisions in force in some states.⁷⁷

⁷¹ Ante, p. 358.

⁷² Ante, p. 355.

⁷³ Ante, p. 260.

⁷⁴ Ante, p. 364.

⁷⁵ Ante, p. 369.

⁷⁶ Ante, p. 365.

⁷⁷ Ante, p. 370.

Profits and Dividends.

Until dividends have been declared, the surplus profits are part of the assets of the company, and do not belong to the stockholders, even though the circumstances are such that a dividend ought to be declared;⁷⁸ and therefore, where a corporation becomes insolvent before its surplus profits have been set apart for the stockholders by declaring a dividend, the surplus, as well as the capital stock, must be applied to satisfy its debts, to the exclusion of any claim by the stockholders.⁷⁹ Where, however, while the corporation is solvent, a dividend is lawfully declared, and money or property equal thereto is specifically set apart as a fund appropriated to its payment, the share of each stockholder is thereby severed from the common funds of the corporation, and becomes his individual property, as against the claims of creditors.⁸⁰ Insolvency of the corporation after a dividend has been declared and set apart does not defeat the right of the stockholders to their shares, as against creditors.⁸¹

Diversion of Capital—Unauthorized Dividends.

The directors of a corporation cannot lawfully diminish the capital required to enable the corporation to do business, either by directly distributing it among the stockholders, or by indirectly doing so, by distributing funds as dividends when there are no surplus profits. The whole capital stock of a corporation is bound, in the hand of all but bona fide purchasers, for the payment of debts of the corporation contracted on the faith of it; and it cannot be diverted by distributing it, either directly or indirectly, among the stockholders. If it is done, the stockholders may be compelled to refund to, or for the benefit of, creditors. Such a distribution is a fraud upon bona fide creditors.⁸²

Dividends cannot lawfully be paid except out of surplus profits earned by the company. This is expressly declared by statute in some jurisdictions, but the rule is so even at common law.⁸³ A payment of dividends, when they cannot lawfully be paid, so as to impair the capital stock, is a fraud upon creditors. It is, in effect, a distribution of the capital among the stockholders, and the stockholders who receive the same may be made to account and refund

⁷⁸ Ante, p. 329.

⁷⁹ Scott v. Fire Co., 7 Paige (N. Y.) 198; ante, p. 330.

⁸⁰ In re Le Blanc, 14 Hun, 8; Id., 75 N. Y. 598; Le Roy v. Insurance Co., 2 Edw. Ch. (N. Y.) 657.

⁸¹ Id.

⁸² Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944, 1 Cumming, Cas. Priv. Corp. 805; Bartlett v. Drew, 57 N. Y. 587; Hastings v. Drew, 76 N. Y. 9; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 194.

⁸³ Ante, p. 332.

for the benefit of creditors.⁸⁴ Besides this, by statute, in many jurisdictions, officers of a corporation are made liable for its debts if they pay dividends when there are no funds out of which they may lawfully be paid, and they may render themselves liable at common law.⁸⁵ But, if dividends are paid by a corporation when it may lawfully pay them, the stockholders cannot be compelled to refund, at the suit of creditors, upon the corporation's subsequently becoming insolvent.⁸⁶

Preferred Stockholders.

Ordinarily holders of preferred stock in a corporation are not to be regarded as creditors, though the stock may have been issued by the corporation for the purpose of raising money; but they are to be regarded as stockholders, and they cannot claim the right to corporate assets until the rights of creditors have been satisfied.⁸⁷ The issue of preferred stock, however, may take the form of a loan, so as to give the holders the standing of creditors.⁸⁸

SAME—STATUTORY LIABILITY OF STOCKHOLDERS.

227. In most of the states, statutes have been enacted making stockholders individually liable to some extent for corporate debts.

The statutes vary in the different states. They are generally

- (a) Statutes making stockholders jointly and severally liable, absolutely and unconditionally, for all the debts of the corporation.**
- (b) Statutes making them so liable until the whole capital stock is paid in, and a certificate thereof filed or recorded.**
- (c) Statutes making them liable, absolutely and unconditionally, to an amount equal to the amount of stock held by them, in addition to the amount that may be due on the stock.**
- (d) Statutes requiring certain acts to be done, as the filing of annual statements, and making stockholders individually liable for corporate debts, on failure to comply.**

228. In a number of states there are constitutional provisions imposing individual liability upon stockholders. Such provisions are self-executing, if they fix the liability, so that they do not depend upon legislation to give them effect.

229. Some of the statutes impose a contractual liability, as in (a), (b), and (c), supra, while the liability imposed by others is penal, as in (d), supra. The nature of the contractual liability

⁸⁴ Wood v. Dummer, supra; Bartlett v. Drew, supra; Main v. Mills, 6 Blss. 98, Fed. Cas. No. 8,974; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 189, 191; Reid v. Manufacturing Co., 40 Ga. 98, 104, 2 Am. Rep. 563; ante, p. 341.

⁸⁵ Post, pp. 593, 596.

⁸⁶ Reid v. Manufacturing Co., 40 Ga. 98, 2 Am. Rep. 563.

⁸⁷ Ante, p. 352.

⁸⁸ Ante, p. 354. †

must depend in each case upon a construction of the statute.
The liability may be either

- (a) In the nature of that of a surety or guarantor,
- (b) Or it may be original, as principal debtor.

230. In regard to the statutory liability of stockholders the following points may be particularly mentioned:

- (a) Where a statute makes stockholders individually liable on dissolution of the corporation, total insolvency, and an assignment for creditors, or appointment of an assignee in bankruptcy or insolvency, or a receiver, is equivalent to a dissolution.
- (b) The words "debts," "demands," etc., used in the statute,
 - (1) In some states are held to include only debts arising from contract, express or implied.
 - (2) In others they are held to include a demand for unliquidated damages for a tort.
- (c) A statute making stockholders liable for debts due "servants and laborers" for services includes only servants performing manual labor.
- (d) The legislature may impose individual liability upon stockholders of existing corporations, if the power to alter, amend, or repeal the charter is reserved, but not otherwise.
- (e) The legislature may repeal a statute imposing individual liability after a debt is contracted, if the liability is penal, but not if it is contractual.

The statutes imposing individual liability upon stockholders for corporate debts vary so much in the different states that it is impossible to lay down general rules that will apply in all cases. There are some rules and principles, however, which are of very general application, and these may be shown, leaving the student to examine the statutes and decisions of his own state. On some questions it will be found that the courts do not agree.

The statutory liability of stockholders to creditors may be excluded by express agreement between the corporation and creditors at the time the debt is contracted.⁸⁹

Unpaid Installments of Subscriptions.

In almost all of the states, constitutional provisions have been adopted, or statutes have been enacted, expressly declaring stockholders liable for debts of the corporation to the extent of all unpaid installments on stock owned by them, or, in some states, on stock transferred by them for the purpose of defrauding creditors. Such liability exists, however, independently of any statutory provision,

⁸⁹ Brown v. Slate Co., 134 Mass. 590. And see United States v. Stanford, 70 Fed. 346, 17 C. C. A. 143, affirmed 161 U. S. 412, 16 Sup. Ct. 576, 40 L. Ed. 751. Cf. Oswald v. Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15.

and has already been considered.⁹⁰ We are concerned in this section only with the liability of stockholders to creditors of the corporation which is imposed by statute, and which does not exist independently of the statute.

Unlimited Statutory Liability.

Sometimes, but not often, stockholders are made jointly and severally liable, absolutely and unconditionally, for all the debts of the corporation. Such a statute does away altogether with the common-law exemption of members from individual liability for corporate debts, and, in effect, renders them liable as partners.⁹¹

Limited Statutory Liability.

More general statutes are those imposing a limited liability. In many states each stockholder in certain corporations is made absolutely liable for the debts of the corporation, "to the amount of stock held or owned by him." Such a statute creates an absolute, contractual liability on the part of each stockholder, in a sum equal to the amount of his stock, in addition to his liability to the corporation for his stock, and not merely for the amount due on his stock.⁹² The liability in such a case is, in most states, held to be original. The stockholders are liable as principal debtors, substantially as if they were partners, except that the liability of each is limited to a sum equal to the amount of his stock.⁹³ The national banking act declares that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."⁹⁴ Under this act, it will be noticed, the shareholders are severally liable. "The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in

⁹⁰ Ante, p. 546.

⁹¹ See *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287.

⁹² *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. 120; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; *Root v. Sinnock*, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626.

⁹³ *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816.

⁹⁴ Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 8465]. The statute excepted shareholders in any banking association then existing under state laws, having not less than \$5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, and provides that they shall be liable only to the amount invested in their shares.

all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly."⁹⁵

A stockholder is not liable at law for corporate debts, under a statute making him liable to the amount of his stock, where he has already paid, on account of the debts of the corporation, a sum equal to the amount of his stock, in addition to paying for his stock.⁹⁶

Statutory Liability Until Capital is Paid in.

In a number of states, stockholders are made jointly and severally liable for debts of the corporation until the whole, or a specified proportion, of the capital stock is paid in, and a certificate thereof is made and recorded or filed as prescribed in the statute. In some states the liability is unlimited, while in others they are made liable only to the amount of their stock; that is, as we have seen, to an amount equal to the amount of their stock in addition to any amount that may have been paid or that may be due on their stock.⁹⁷ The fact that a stockholder has fully paid for his stock does not relieve him from liability, under such statutes, if the capital stock of the company, or the required proportion, is not paid in, and the certificate made and recorded or filed. Two things are necessary, under these statutes, to end the stockholder's liability. The whole capital stock, or the prescribed proportion thereof, must be paid in, and the certificate must be recorded or filed.⁹⁸ The certificate is not conclusive evidence, as against creditors, that the capital stock has been paid.⁹⁹ The question of liability under such statutes as these frequently arises in cases where stock is paid for in property, and it is claimed that the property was taken at an overvaluation. We have, in a preceding chapter, considered the effect of such payments.¹⁰⁰

If the capital stock is increased after the original stock has all been paid in, the liability of holders of the original stock, who refuse to take the new stock, is not revived under a statute making stockholders liable for the debts of the corporation until its whole capital stock is paid in, and a certificate of the fact recorded or filed. The liability in such a case rests solely upon the holders of the new stock.¹⁰¹

⁹⁵ U. S. v. Knox, 102 U. S. 422, 26 L. Ed. 216.

⁹⁶ Garrison v. Howe, 17 N. Y. 458; Mathez v. Neidig, 72 N. Y. 100; Sedgwick City Bank v. Sedgwick Milling & E. Co., 59 Kan. 654, 54 Pac. 681; Munson v. Warren, 63 Kan. 162, 65 Pac. 222; post, p. 591.

⁹⁷ Note 92, supra.

⁹⁸ Veeder v. Mudgett, 95 N. Y. 295. And see Heinberg Bros. v. Thompson, 47 Fla. 163, 37 South. 71.

⁹⁹ Id.

¹⁰⁰ Ante, p. 365.

¹⁰¹ Sayles v. Brown, 40 Fed. 8, W. D. Smith, Caa. Corp. 107; Veeder v. Mudgett, 95 N. Y. 295.

Constitutional Provisions.

In a number of states there are constitutional provisions declaring stockholders liable, to a greater or less extent, for the debts of the corporation. Whether these provisions are self-executing, or whether they require statutory enactment to carry them into effect, depends upon a construction of the language of the provision. If, said Judge Mitchell in a Minnesota case, the nature and extent of the liability imposed is fixed by the provision itself, so that it can be determined by an examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, the provision should be construed as self-executing, and its language as addressed to the courts. And it was held that a constitutional provision that "each stockholder in any corporation * * * [with certain exceptions] shall be liable to the amount of stock held or owned by him" was self-executing.¹⁰² If, on the other hand, the provision leaves anything to be fixed by law before it can be given effect, or if, on a construction of the entire provision in the light of other provisions bearing upon the same subject, it appears that it is addressed to the legislature, and contemplates action by it, the provision cannot be regarded as self-executing.¹⁰³

Effect of Dissolution of Corporation.

The dissolution of a corporation by its own voluntary act, or by its ceasing to act as a corporation, does not destroy the right of its creditors to enforce the statutory liability of stockholders.¹⁰⁴

Nature of Stockholders' Liability—Penal or Contractual.

The liability of stockholders under some statutes is contractual, while under others it is penal. This distinction is very important.

¹⁰² Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. The fact that no remedy is provided for does not show that the provision is not self-executing, since the liability being imposed, the law furnishes a remedy. Willis v. Mabon, supra.

¹⁰³ French v. Teschemaker, 24 Cal. 518; Morley v. Thayer (C. C.) 3 Fed. 737. The provision of the Kansas constitution that "dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," is not self-executing without the aid of legislation. Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194. See, also, Tuttle v. National Bank of Republic, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750. Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 410, 34 L. R. A. 757, 51 Am. St. Rep. 654; Western Nat. Bank v. Lawrence, 117 Mich. 669, 76 N. W. 105; Hancock Nat. Bank v. Farnum, 20 R. I. 466, 40 Atl. 341; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

¹⁰⁴ Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335, 337; Kincaid v. Dwinelle, 59 N. Y. 548.

For instance, penal statutes will not be enforced in a foreign jurisdiction,* and liability for a penalty does not survive the death of the person liable.† The effect of the statute, and not the form, determines its character.¹⁰⁵ A statute which directs or prohibits some act, and imposes some forfeiture for its transgression, is a penal statute. Therefore a statute providing that a corporation shall not transact business until certain preliminaries have been complied with, and that, if it does, the members shall be personally liable to the creditors, has been held to impose a penalty.¹⁰⁶ So, where the corporation is required to file annually a certificate setting forth certain facts, such as the amount of assessments voted by the company and actually paid in, and the amount of all existing debts, and it is provided that, if it shall fail to do so, all the stockholders shall be jointly and severally liable for all the debts of the company, the liability thus imposed is penal, and not contractual.¹⁰⁷

But the liability under a statute providing that all stockholders shall be severally or jointly and severally liable individually to the creditors of the corporation, to an amount equal to the amount of their stock, for all debts or contracts made by the company, until the whole amount of the capital stock shall have been paid in, and a certificate thereof filed, is not in the nature of a penalty, but a liability arising upon a contract.¹⁰⁸ The same is true of a statute making stockholders liable, absolutely and unconditionally, for the debts of the corporation, or liable to the extent of their stock, as in the national banking act.¹⁰⁹ In some states such liability is declared to be, not contractual, but statutory.‡

Same—Nature of Contractual Liability.

The statutory or constitutional liability of stockholders *ex contractu* for corporate debts to the amount of their stock, though sui

* Post, p. 581.

† Post, p. 571.

¹⁰⁵ *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14.

¹⁰⁶ *Id.*

¹⁰⁷ *Sayles v. Brown* (C. C.) 40 Fed. 8, W. D. Smith, Cas. Corp. 107; *Wing v. Slater*, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566. But see *Fitzgerald v. Weidenbeck* (C. C.) 76 Fed. 695.

¹⁰⁸ *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; *Id.*, 16 Fla. 428, 26 Am. Rep. 721; *Cuykendall v. Miles* (C. C.) 10 Fed. 342; *Heinberg Bros. v. Thompson*, 47 Fla. 163, 37 South. 71.

¹⁰⁹ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Cochran v. Wiechers*, 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557, 18 N. W. 356; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613; *Hencke v. Twomey*, 58 Minn. 550, 60 N. W. 667, W. D. Smith, Cas. Corp. 106; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254.

‡ *Hancock Nat. Bank v. Farnum*, 20 R. I. 466, 40 Atl. 341.

generis, is in some cases, but not in all, in the nature of the liability of a surety or guarantor.¹¹⁰ Sometimes it is said to be that of a guarantor or surety or partner,¹¹¹ but it is clear that this is going too far. In some respects it is similar, but in many respects it is different.¹¹² "The truth is," says Mr. Taylor, "the liability of shareholders under statutes imposing individual liability for corporate indebtedness is the liability of shareholders under such statutes; and to speak of it as the liability of guarantors, or the liability of partners, is to call it what it is not."¹¹³ The nature of the liability must depend upon the particular statute. It may be in the nature of the liability of a surety or guarantor, or it may not. Thus, where the charter of a bank provided that the persons and property of the stockholders should be "at all times liable, pledged and bound for the redemption of the bills and notes of the bank, at any time issued, in proportion to the number of shares that each individual might hold and possess," it was held that the stockholders were liable, as principals, to redeem the bills of the bank at their face, after the bills had been presented to the bank and payment refused, although the assignee of the bank had assets in his hands sufficient to pay them.¹¹⁴ And under a statute making stockholders, upon default of the corporation in the payment of any debt, individually responsible, without any limitation, or individually liable for an amount equal to the amount of their stock, it has been held that the liability of the stockholders is primary, and

¹¹⁰ *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. It was therefore held in this case that the insolvent law, providing that the release of any debtor under the act should not discharge "any other party liable as surety, guarantor, or otherwise for the same debt," included stockholders who were liable for the debts of the corporation. See, also, *National Loan & Building Ass'n v. Lichtenwalner*, 100 Pa. 100, 45 Am. Rep. 359; *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 64 Pac. 984, 88 Am. St. Rep. 229.

¹¹¹ *Hanson v. Donkersley*, 37 Mich. 184. But see *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557, 18 N. W. 856.

¹¹² In *Grand Rapids Sav. Bank v. Warren*, *supra*, it was said by Chief Justice Cooley: "The shareholder, it is true, occupies, as regards the creditor, the position of surety for the bank [citing *Hanson v. Donkersley*, *supra*], but he is something more than a surety; he is one of the associates of the bank, and, by the very terms of the association, he is deemed to undertake for the debts which the bank contracts."

¹¹³ *Tayl. Corp.* § 714.

¹¹⁴ *Hatch v. Burroughs*, 1 Woods, 439, Fed. Cas. No. 6,203. And see *Harger v. McCullough*, 2 Denio (N. Y.) 123; *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; *Parrott v. Colby*, 6 Hun (N. Y.) 57; *Id.*, 71 N. Y. 597; *Jagger Iron Co. v. Walker*, 76 N. Y. 521. An extension of the debt by the creditor, without the stockholders' consent, does not release them from liability, though it would release one who was strictly a surety or guarantor. *Grew v. Breed*, 10 Metc. (Mass.) 569.

the same as the liability of partners, except that, in the latter case, they are only liable to the amount of their stock.¹¹⁵

The liability under a statute making stockholders liable for corporate debts until the capital stock is paid in, and a certificate thereof filed, has been held to be unconditional, original, and immediate, and not collateral to the liability of the corporation, nor in any degree dependent upon the insufficiency of the corporate assets.¹¹⁶

What Constitutes "Dissolution."

A statute making stockholders liable for debts of the corporation at the time of its dissolution does not mean a dissolution by expiration of the charter, or by action of the state. A dissolution, so as to render stockholders liable under the statute, is effected by its total insolvency, and the appointment of a receiver, or an assignee in bankruptcy or insolvency, to take charge of its property and wind up its business, or an assignment for the benefit of creditors, and suspension of business.¹¹⁷

But a right of action does not accrue against stockholders upon the corporation becoming insolvent in the sense, simply, that its property is insufficient for the payment of its debts, nor upon the appointment of a receiver merely for the purpose of carrying on its business, and not on account of its insolvency, or to wind up its business.¹¹⁸

"Debts," "Demands," etc., within the Statutes.

There is some difference of opinion in the construction of the word "debts" or "demands" or "dues," used in the statutes under consideration. It has been held that the term "debt" does not include unliquidated claims for damages for torts of the corporation, for which no judgment has been recovered, but is intended to include only "those obligations arising on express and implied contracts, growing out of dealings between the corporation and other corporations or individuals, where the financial condition of such corporation would or might be the foundation of credit."¹¹⁹ Some courts, however, hold that the

¹¹⁵ *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; *Thompson v. Melsser*, 108 Ill. 359; *Fuller v. Ledden*, 87 Ill. 310; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

¹¹⁶ *Manufacturing Co. v. Bradley*, 105 U. S. 175.

¹¹⁷ *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *Briggs v. Peniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. 120; *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Bronson v. Schneider*, 49 Ohio St. 433, 33 N. E. 233; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234.

¹¹⁸ *Bronson v. Schneider*, *supra*; *Younglove v. Lime Co.*, *supra*.

¹¹⁹ *Doolittle v. Marsh*, 11 Neb. 243, 9 N. W. 54. It was held that the word "demands," in a New York statute, did not include damages sustained by reason of a bridge of the corporation being out of repair. *Heacock v. Sher-*

statutes cover a demand for unliquidated damages arising from a tort.¹²⁰ A judgment for a tort has been held to be an "indebtedness," with the meaning of a statute.¹²¹

The statutory liability of members of a corporation for its debts extends to debts contracted in another state. They are liable for such debts to the same extent as for debts contracted at home.¹²²

Debts Due Clerks, Laborers, etc.

In some states a liability is imposed by statute upon stockholders for debts due clerks, servants, and laborers for services performed for the corporation. Of course, the statutes vary in the different states. A foreman or superintendent who is not an officer of the corporation, but an employé, has been held a servant, within the meaning of a statute making stockholders liable for debts due "clerks, servants, and laborers for services," though he does not perform manual labor.¹²³ But a bookkeeper employed at a yearly salary was held not to be within a statute imposing liability for debts due a "laborer, servant, or apprentice," as it was considered that the statute was intended to include only persons performing menial or manual services,—the services of that class of persons who look to the reward of a day's labor for present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence.¹²⁴ It has also been held that a traveling salesman is not a laborer, within the meaning of such statutes.¹²⁵

man, 14 Wend. (N. Y.) 58. So in Massachusetts it has been held that the liability for infringement of letters patent is not, before judgment, a "debt," within a statute making officers liable. *Child v. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328. A debt arising on a contract for the purchase of goods, entered into in November, 1891, but under which there was no delivery until October, 1892, was not, until such delivery, an existing debt, within the meaning of a statute providing that, upon the failure of a manufacturing corporation to file a statement of its condition on or before the 15th day of February in each year, the stockholders shall be liable for any debt then existing. *Wing v. Slater*, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566.

¹²⁰ *Rider v. Fritchey*, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513. Here the statute used the word "dues." *Carver v. Manufacturing Co.*, 2 Story, 432, Fed. Cas. No. 2,485; *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668 ("acts and contracts"). But see *Brown v. Trill* (C. C.) 89 Fed. 641.

¹²¹ *Powell v. Railway Co.* (C. C.) 36 Fed. 726, 2 L. R. A. 270.

¹²² *Hutchins v. Mining Co.*, 4 Allen (Mass.) 580.

¹²³ *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335. Compare *State v. Rusk*, 55 Wis. 465, 13 N. W. 452.

¹²⁴ *Wakefield v. Fargo*, 90 N. Y. 213. See, also, *Bristor v. Smith*, 158 N. Y. 157, 53 N. E. 42.

¹²⁵ *Jones v. Avery*, 50 Mich. 326, 15 N. W. 494.

Excepted Classes of Corporations.

Sometimes the statutes except certain corporations from their operation. Thus, Minnesota corporations organized for the purpose of carrying on any kind of manufacturing or mechanical business are excepted. To come within such an exception a corporation must have been organized exclusively for carrying on a manufacturing or mechanical business. If the purpose for which a corporation is formed, as stated in its articles of association, is to carry on a manufacturing or mechanical business, and also some other and distinct kind of business, not properly incidental to or connected with the former, it will not be within the exception.¹²⁶ But the mere fact that a corporation organized to carry on a manufacturing business engages in some business not authorized by its articles does not deprive its stockholders of the benefit of the exception.*

Release or Discharge of Corporation.

Where the statute makes stockholders liable for the debts and contracts of the corporation jointly with the corporation, there must be a debt due from the corporation, to render a stockholder liable. If a creditor of the corporation, therefore, releases the corporation from the debt, in insolvency proceedings or otherwise, there is no longer any debt upon which he may hold the stockholders. The liability of the stockholders is in the nature of the liability of partners for a debt of the firm, and whatever releases the corporation releases them also.¹²⁷

Constitutional Law—Laws Affecting Existing Corporations.

If the legislature has reserved the right to amend, alter, or repeal the charter of a corporation, it may, by a law passed after incorporation, impose individual liability upon the stockholders for corporate

¹²⁶ State v. Minnesota Thresher-Manuf'g Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Mohr v. Elevator Co., 40 Minn. 343, 41 N. W. 1074; Arthur v. Willis, 44 Minn. 409, 46 N. W. 551; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528; First Nat. Bank v. Winona Plow Co., 58 Minn. 167, 59 N. W. 997.

* Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334. See, also, Senour Mfg. Co. v. Church Paint & Mfg. Co., 81 Minn. 294, 84 N. W. 109.

¹²⁷ Mohr v. Elevator Co., 40 Minn. 343, 41 N. W. 1074. Under the Maryland statute, which makes stockholders directly liable to creditors of the corporation for double the par value of their stock, such liability is not secondary, but primary, and, as between them, the stockholder is a principal debtor, who may be sued without exhausting the remedy against the corporation; hence an agreement between a creditor and the corporation by which collaterals are applied on the debt at an agreed value in good faith, or a settlement with indorsers by which they are released on payment of an agreed sum, does not operate to discharge a stockholder from liability for a balance still due the creditor. Knickerbocker Trust Co. v. Myers (C. C.) 133 Fed. 764.

debts.¹²⁸ And it has been held that it can do so even where the power of alteration, amendment, or repeal has not been reserved; that such a law is not unconstitutional as impairing the obligation of the contract between the stockholders and the state as evidenced by the charter.¹²⁹

Same—Repeal or Change of Law.

It has been generally held that, where the liability imposed upon stockholders for debts and contracts of the corporation is contractual, the claim of a creditor of the corporation against a stockholder is within the protection of the clause of the federal constitution prohibiting laws impairing the obligation of contracts; and, therefore, that where a statute or the charter of a corporation imposes upon the stockholders liability for the debts of the corporation to the extent of their stock, an act or constitutional provision repealing the statute or amending the charter so as to take away this liability is unconstitutional and void as to existing creditors.¹³⁰ There is some authority, however, to the contrary.¹³¹ Certainly the legislature may modify the form of remedy for enforcing the liability,¹³² provided the substituted remedy does not impair rights which have accrued under the contract.†

¹²⁸ Ante, p. 216; *Sleeper v. Goodwin*, 67 Wls. 577, 31 N. W. 335.

¹²⁹ Ante, p. 208, note; *Gray v. Coffin*, 9 Cush. (Mass.) 192. But see *Ireland v. Palestine, etc., Turnpike Co.*, 19 Ohio St. 369; *Evans v. Nellis* (C. C.) 101 Fed. 920.

¹³⁰ *Hathorn v. Calef*, 2 Wall. (U. S.) 10, 17 L. Ed. 776; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557, 18 N. W. 356; *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. 120; *Western Nat. Bank v. Reckless* (C. C.) 96 Fed. 70; *Evans v. Nellis*, supra; *Barton Nat. Bank v. Atkins*, 72 Vt. 83, 47 Atl. 176.

¹³¹ *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559.

¹³² *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 10 Sup. Ct. 589, 33 L. Ed. 994; *Straw & E. Mfg. Co. v. L. D. Kilbourne B., S. Co.*, 80 Minn. 125, 83 N. W. 36.

† *Western Nat. Bank v. Reckless*, supra; *Evans v. Nellis*, supra; *Webster v. Bowers* (C. C.) 104 Fed. 627; *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. Acts Gen. Assem. Md. March 25, 1904, p. 179, c. 101, repealing the pre-existing remedy of a creditor to bring a separate action at law to enforce a several statutory liability against a stockholder of a banking association for corporate debts to the extent of an amount equal to the par value of the stock held by him, conferred by Acts Gen. Assem. Md. 1892, p. 156, c. 109, § 85L, and substituting therefor a remedy by bill in equity on behalf of all creditors against all stockholders in the state, and declaring that such statutory liability shall constitute an asset of the corporation if necessary to pay debts, etc., not only changed the remedy, but abrogated the contract right conferred by such former statute, and was therefore unconstitutional, as impairing the obligation of contract, as against creditors of a corporation who became such and had brought suit to enforce such statutory liability prior to the passage of the act. *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 71

SAME—WHO ARE LIABLE AS STOCKHOLDERS UNDER THE STATUTES.

281. Those who appear on the books of the corporation are *prima facie* liable under the statutes as stockholders. But there are some exceptions:

(a) A person is not liable if stock is registered in his name, without his knowledge or consent, express or implied.

(b) As to the effect of a transfer of shares, the authorities are conflicting:

(1) In some states the transferror is relieved from liability, and the transferee takes his place.

(2) In others, the transferror remains liable for debts contracted while he was owner of the shares, and no liability therefor attaches to the transferee.

(3) In others, both are liable for debts contracted while the transferror owned the shares.

(4) Generally this question is settled by the express terms of the statute.

(5) Where the shares are transferable on the books of the corporation a transferror is not relieved from liability unless he has his transfer registered, or takes due steps to have it done.

(6) A transfer to a person who is incapable of holding the stock and of assuming liability in respect thereto does not relieve the transferror from liability.

(7) Nor is he relieved by a transfer to an insolvent person for the purpose of escaping liability, when he knows the corporation to be insolvent.

(8) Nor is he relieved by a colorable transfer.

(9) Nor is he relieved by a transfer after the corporation has become insolvent and ceased to do business.

(10) Where stock transferable on the books of the corporation is transferred to a pledgee, trustee, etc., he is personally liable thereon if he appears on the books as the absolute owner, but not otherwise.

(11) Creditors must elect whether to hold the real or the apparent owner. They cannot hold both.

(c) Married women, if capable of holding stock, are subject to the statutory liability, though they may not have capacity to contract, as the liability is imposed by statute.

(d) The statutory liability survives, as against the personal representative of a deceased stockholder, if the liability is contractual, but not if it is penal.

(e) Forfeiture of stock for nonpayment of assessments releases the stockholder from statutory liability, if he thereby ceases to be a stockholder.

(f) Holders of certificates of unauthorized stock are not liable unless the circumstances estop them as against creditors.

C. C. A. 199, 1 L. R. A. (N. S.) 1171. *Contra*, *Miners' & M. Bank v. Snyder* (Md.) 59 Atl. 707, 68 L. R. A. 312. Cf. *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 77 N. E. 877.

Where the statute makes stock transferable on the books of the corporation, and makes "shareholders" or "stockholders" liable for the debts of the corporation,¹⁸³ the general rule is that every person in whose name, as owner, stock is registered on the books of the corporation, with his knowledge and consent, is liable. He is a "shareholder" or "stockholder," within the meaning of the statutes. When the name of an individual appears on the stock book of a corporation as a stockholder, prima facie he is the owner of the stock, and, in an action against him as stockholder, he has the burden of rebutting the presumption.¹⁸⁴ To this rule there are some exceptions. These will be pointed out as we go along. By some cases, indeed, it is held that the books are not even prima facie evidence of ownership.¹⁸⁵

Shares Registered in Name of Person without His Knowledge.

It is clear that a person cannot be compelled to become a stockholder, and to assume liability as such, without his consent. Membership in a corporation can only result from contract, express or implied, and there can be no contract without mutual consent. It follows that, if shares in a corporation are registered in the name of a person without his knowledge or consent, he cannot be held liable.¹⁸⁶ He may become liable, however, by acquiescence after knowledge of the facts, for consent in such a case will be implied.¹⁸⁷ And if a person is elected to an office in the corporation for which ownership of stock is a necessary qualification, and shares are transferred to him on the books, and he acts as such officer, he will be chargeable with knowledge of the fact that shares stand in his name.¹⁸⁸

¹⁸³ Ante, p. 550, where some of the statutes are given.

¹⁸⁴ *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Holland v. Development Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; *Sherwood v. Illinois Trust & Savings Bank*, 195 Ill. 112, 62 N. E. 835, 88 Am. St. Rep. 183.

¹⁸⁵ *Carey v. Williams*, 79 Fed. 906, 25 C. C. A. 227; *Sigua Iron Co. v. Greene*, 104 Fed. 854, 44 C. C. A. 221.

¹⁸⁶ *Stephens v. Follett (C. C.)* 43 Fed. 842. In this case it was held that a person who had subscribed and paid for a specified number of shares of a "proposed increase" of the capital stock of a national bank was not liable as a shareholder, where the increase was never in fact issued, but the bank officials transferred to him instead, on the books of the bank, old stock of the bank, without his consent or knowledge. It was further held that he was not estopped to deny that he was a shareholder by the fact that he received a dividend on the old shares so transferred to him, where he received it in the belief that it was paid him by virtue of his subscription to the new stock. And see *Simmons v. Hill*, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476.

¹⁸⁷ *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; *Finn v. Brown*, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936.

¹⁸⁸ *Finn v. Brown*, supra.

Effect of Transfer of Shares.

In *President, Directors, etc., of Middletown Bank v. Magill*,¹³⁹ under a charter declaring that members of a corporation should at all times be liable for all debts due by the corporation, it was contended by the plaintiffs, and held by two of the judges, that the legislature intended to subject members to the same liability as if they had not been incorporated,—that is, to the liability of partners,—and that members of the corporation at the time a debt was contracted became subject to a liability therefor, which continued notwithstanding a valid sale and transfer of their shares, and that transferees became liable only for debts contracted after the transfer. A majority of the court, however, held that no liability attaches under such a statute until the corporate property fails, and it becomes necessary to resort to the stockholders' liability; and, therefore, that such persons, and such persons only, as are then stockholders are subject to the liability, and that a valid and complete transfer of stock, in the absence of express charter or statutory provision to the contrary, relieves the transferror of all liability to creditors of the corporation under such statutes, and the transferee becomes liable in his place.

On this point the terms of the statutes in different states vary, and in consequence the decisions are conflicting. Clearly, a valid transfer relieves the transferror of liability for debts subsequently contracted.¹⁴⁰ In most states, but not in all, it is held that the transferee of shares is liable for debts contracted before he acquired the shares if he holds them when the liability is sought to be enforced;¹⁴¹ but that he is not liable if he does not own the shares when the liability is sought to be enforced.¹⁴² In some states the transferror of shares is relieved of any liability, even for debts contracted while he was a stockholder, if the transfer was bona fide.¹⁴³ But others hold, without qualification, that

¹³⁹ 5 Conn. 28, 1 Cumming, Cas. Priv. Corp. 912.

¹⁴⁰ *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094.

¹⁴¹ *Curtis v. Harlow*, 12 Metc. (Mass.) 3; *Brown v. Hitchcock*, 36 Ohio St. 667; *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Root v. Sinnock*, 120 Ill. 350, 11 N. E. 339, 60 Am. Rep. 558; *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497; *Dauchy v. Brown*, 24 Vt. 197; *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 South. 149. Contra, *Chesley v. Pierce*, 32 N. H. 388, 1 Cumming, Cas. Priv. Corp. 936; *Moss v. Oakley*, 2 Hill (N. Y.) 265; *McCullough v. Moss*, 5 Denio (N. Y.) 567; *Olson v. Cook*, 57 Minn. 552, 59 N. W. 635; *Maine Trust & Banking Co. v. Southern Loan & Trust Co.*, 92 Me. 444, 43 Atl. 24.

¹⁴² *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497; *Holyoke Bank v. Burnham*, 11 Oush. (Mass.) 183.

¹⁴³ *Dauchy v. Brown*, 24 Vt. 197; *Bond v. Appleton*, 8 Mass. 472, 5 Am. Dec. 111; *President, etc., of Middletown Bank v. Magill*, 5 Conn. 28, 1 Cumming, Cas. Priv. Corp. 912. But see *Curtis v. Harlow*, 12 Metc. (Mass.) 3.

he remains liable on the stock, while some hold that he is liable if the transferee is insolvent, or for any other reason the liability cannot be enforced against him, though the transfer was bona fide.¹⁴⁴ In a late Rhode Island case it was held that the liability under a statute making stockholders liable for the debts of the corporation until the capital stock is paid in, and a certificate thereof recorded, includes all persons who were stockholders when the debt was contracted, and all persons who are stockholders when the liability is sought to be enforced, but does not extend to persons becoming stockholders after the debt was contracted, and ceasing to be such before the debt becomes payable and action is brought.¹⁴⁵ And such seems to be the rule in Massachusetts.¹⁴⁶

Sometimes the statute, as is the case with the national banking act, expressly declares that transferees of stock shall succeed to the liabilities of the transferor. In such a case there can be no doubt that a valid and complete transfer relieves the transferor of liability, and substitutes the transferee in his place.¹⁴⁷ Under some statutes the stockholder's liability continues, notwithstanding his transfer.¹⁴⁸ Under some statutes his liability continues for a limited time after the transfer.¹⁴⁹

Same—Registration of Transfer.

Where, by the charter, or by statute, shares are transferable on the books of the corporation, the rule is that the person who appears on the books as owner is the one to whom the statutory liability attaches. In order, therefore, that a shareholder may relieve himself from liability, even by an actual and bona fide sale of his stock, he must take all due precautions to have the transfer properly registered. Thus, where a shareholder in a national bank had sold his stock several months before the insolvency of the bank, but the trans-

¹⁴⁴ *Moss v. Oakley*, 2 Hill (N. Y.) 265; *Brown v. Hitchcock*, 36 Ohio St. 667; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Harpold v. Stobart*, 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618; *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497; *Jackson v. Meek*, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Johnson v. Bleaching Co.*, 15 Gray (Mass.) 216.

¹⁴⁵ *Sayles v. Bates*, *supra*.

¹⁴⁶ *Holyoke Bank v. Burnham*, *supra*.

¹⁴⁷ *Johnson v. Lafin*, 5 Dill. 65, Fed. Cas. No. 7,393, 1 Cumming, Cas. Priv. Corp. 608; *Johnston v. Same*, 103 U. S. 800, 26 L. Ed. 532; *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266; *Cleveland v. Burnham*, 55 Wis. 598, 13 N. W. 677, 680.

¹⁴⁸ *Gunnison v. United States Inv. Co.*, 70 Minn. 292, 73 N. W. 149; *Tiffany v. Glesen*, 96 Minn. 488, 105 N. W. 901.

¹⁴⁹ *Harper v. Carroll*, 62 Minn. 152, 64 N. W. 145; s. c. 66 Minn. 487, 69 N. W. 610, 1069.

fer was not registered on the books until the date of the bank's failure, and it did not appear that any steps were taken by him to have it registered, he was held subject to the statutory liability.¹⁵⁰ But the vendee of shares, who fails to have the transfer registered, will be liable to the vendor for anything which the latter may be compelled to pay by reason of his appearing on the books as the owner of the shares.¹⁵¹

A shareholder who has sold his stock will not be liable merely because the transfer has not been made on the books, where he is not in any way to blame for such omission. If it affirmatively appears that he has done all that a careful and prudent business man could reasonably do to effect a transfer on the books he cannot be held liable.¹⁵²

Same—Transfer to Person Incapable of Assuming Liability.

The transfer, to relieve the transferror from liability, must be made to some one who is capable in law of taking and holding the stock, and of assuming the transferror's liability with respect thereto.¹⁵³

Same—Transfer to Infant.

Thus, a transfer to an infant, even in ignorance of his minority, does not relieve the transferror from liability, unless the transferee has attained his majority, and become himself liable by ratification.¹⁵⁴

Same—Transfer to Corporation.

As has been shown, it is the general rule that a corporation has no power to deal in its own stock. The national banking act expressly declares that national banking associations shall not do so. A sale or transfer of shares to the corporation itself, therefore, is illegal, or

¹⁵⁰ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Price v. Whitney* (C. C.) 28 Fed. 297; *Irons v. Bank* (C. C.) 27 Fed. 591; *Johnson v. Bleaching Co.*, 15 Gray (Mass.) 216; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Giesen v. London & Northwest American Mortg. Co.*, 102 Fed. 584, 42 C. C. A. 515; *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; *Knickerbocker Trust Co. v. Myers* (C. C.) 133 Fed. 764. But see, contra, *Harpold v. Stobart*, 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618.

¹⁵¹ *Johnson v. Underhill*, 52 N. Y. 203.

¹⁵² *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266; *Young v. McKay* (C. C.) 50 Fed. 394; *Hayes v. Shoemaker* (C. C.) 39 Fed. 319; *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373. Cf. *Giesen v. London & Northwest American Mortg. Co.*, 102 Fed. 584, 42 C. C. A. 515.

¹⁵³ *Nickalls v. Merry*, L. R. 7 H. L. 530; *Symons' Case*, 5 Ch. App. 298; *Weston's Case*, 5 Ch. App. 614, 620.

¹⁵⁴ *Mann's Case*, 3 Ch. App. 459, note, 1 Cumming, Cas. Priv. Corp. 942; cases cited in preceding note. Cf. *Foster v. Lincoln's Ex'r*, 79 Fed. 170, 24 C. C. A. 470.

at least, if not expressly prohibited, *ultra vires*; and a transfer, either to the corporation itself, or to a known trustee for it, is ineffectual to change the relation of the parties, and does not release the transferror from liability as a stockholder for the debts of the corporation.¹⁵⁵ But it has been held that a corporation which, without authority, purchases and holds shares in another corporation, will be liable as a stockholder, notwithstanding the *ultra vires* character of the transaction.¹⁵⁶ If a stockholder acts in good faith in selling his shares, even though it may be to the president of the corporation, not knowing that the purchase is really on behalf of the corporation, the transfer is valid, and he ceases to be a stockholder for any purpose; but in such a case the president or other person becomes the real transferee, in his individual capacity, and is substituted for the transferror, and he becomes liable on the shares as a stockholder.¹⁵⁷

Same—Transfer to Insolvent.

In this country it is generally held that a stockholder who knows that the corporation is insolvent cannot transfer his shares to an irresponsible or insolvent person, for the purpose of escaping liability to creditors of the corporation. In such a case the transfer is void as to the creditors, and the transferror remains liable. And it makes no difference that the transfer is "out and out," so as to divest the transferror of all interest therein.¹⁵⁸ In England the rule is different. It is there held that a stockholder may sell and transfer his

¹⁵⁵ *Johnson v. Lafin*, 5 Dill. 65, Fed. Cas. No. 7,393, 1 Cumming, Cas. Priv. Corp. 608; *Johnston v. Same*, 103 U. S. 800, 26 L. Ed. 532.

¹⁵⁶ *Citizens' State Bank v. Hawkins*, 18 C. C. A. 78, 71 Fed. 369. The decision was based on the principle that "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, and work a legal wrong." See ante, p. 178.

¹⁵⁷ *Johnson v. Lafin*, supra.

¹⁵⁸ *Marcy v. Clark*, 17 Mass. 330; *Nathan v. Whitlock*, 3 Edw. Ch. (N. Y.) 215, 1 Cumming, Cas. Priv. Corp. 953; *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386; *Dauchy v. Brown*, 24 Vt. 197; *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639; *Foster v. Lincoln's Ex'r*, 79 Fed. 170, 24 C. C. A. 470; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858. But see *Chouteau Spring Co. v. Harris*, 20 Mo. 382. Where a stockholder in a national bank, with knowledge of its insolvency, sold his stock to escape liability to assessment, and two years later the bank failed, in a suit by the receiver against him to recover an assessment, he was liable only to creditors before the transfer. *McDonald v. Dewey*, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128. See, also, *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 48 N. E. 894. As between the corporation and the transferror, the corporation may be barred by its laches from repudiating the transfer. *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 53 N. E. 507, 47 L. R. A. 246.

shares to an insolvent person, or man of straw, and if the transaction is a bona fide, "out and out" sale and transfer, he cannot be held liable to creditors, even though his motive was to escape liability.¹⁵⁹

It has been held that a sale by a pledgee of stock, pursuant to a power of sale in his contract, is not voidable, as a fraud on creditors of the corporation, though made to an insolvent person for the purpose of escaping liability.¹⁶⁰

In the absence of actual fraudulent intent, the fact that the transferee was insolvent will not prevent the transfer from being effectual so as to release the transferor from further liability as a stockholder, though knowledge of insolvency would be strong evidence of fraud.¹⁶¹

Same—Sham or Colorable Transfers.

Not only in this country, but in England as well, it is settled law that in case of a transfer to an insolvent or irresponsible person, if the transaction is not a bona fide, "out and out" sale and transfer, but a mere simulation to avoid appearing as a stockholder, the transferor will remain liable. Stockholders have often tried to escape liability by thus transferring the shares gratuitously to their clerk, or some other irresponsible party. But it has always been held that the actual owners of stock cannot shield themselves against liability by thus putting the title to the stock in the name of an irresponsible person. "Creditors have the right to call upon the actual stockholders for contribution, and this right cannot be defeated by a merely colorable transfer of the legal title to some third party, who in fact holds the same for the benefit of the real owner of the stock."¹⁶²

The same is true where a man buys or takes stock, and has it entered on the books of the corporation in the name of an irresponsible person, without its ever having appeared on the books in his own name. In such a case the creditors of the corporation may hold him liable.¹⁶³

¹⁵⁹ De Pass' Case, 4 De Gex & J. 544.

¹⁶⁰ Holyoke Bank v. Burnham, 11 Oush. (Mass.) 187; Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47.

¹⁶¹ Miller v. Insurance Co., 50 Mo. 55; Sykes v. Holloway (C. C.) 81 Fed. 432; Foster v. Broas (Mich.) 79 N. W. 696; Earle v. Carson, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 873.

¹⁶² Welles v. Larrabee, 86 Fed. 866, 868, 2 L. R. A. 471. See Hyam's Case, 1 De Gex, F. & J. 75; 1 Cumming, Cas. Priv. Corp. 944; Williams' Case, L. R. 9 Eq. 225, note; National Bank v. Case, 99 U. S. 628, 25 L. Ed. 448, 1 Cumming, Cas. Priv. Corp. 948; Davis v. Stevens, 17 Blatchf. 259, Fed. Cas. No. 3,653; note, 15 O. C. A. 136, 137; Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844; Peter v. Union Mfg. Co., 56 Ohio St. 181, 46 N. E. 894; American Alkali Co. v. Kurtz (C. C.) 134 Fed. 663.

¹⁶³ Davis v. Stevens, 17 Blatchf. 259, Fed. Cas. No. 3,653.

Same—Transfer after Suspension of Business.

It has been held that after a national bank has become insolvent, and has closed its doors and stopped doing business, the liability of shareholders to creditors is so far fixed that any transfer at all of their shares will be held fraudulent and inoperative as against the creditors.¹⁰⁴ And the same may be said of other corporations.¹⁰⁵

Pledges.

It is well settled, where stock is transferable on the books of the corporation, that, if stock in a corporation is issued or transferred to a person in such a way that he appears on the books as the legal and absolute owner, the creditors of the corporation cannot be required to go behind the books and inquire into equities that may exist between him and the corporation, or between him and the person from whom he took the transfer. If he appears on the books as the legal and real owner, he is, as far as the rights of corporate creditors are concerned, a stockholder, and subject to the statutory liability, though he may in fact hold the stock merely as collateral security.¹⁰⁶ The chief reason for this rule is that the pledgee, by thus taking the absolute legal title, and holding himself out as the legal owner of the stock, estops himself from setting up the fact that he was merely a pledgee. "The true ground of liability, where it exists, is not because the pledgee is the owner in fact of the stock, for he is not, but the fact that the pledgee has received a transfer of the stock in such form that the legal ownership appears to be in him; and, by thus holding himself out as apparent owner, he is estopped from showing the contrary."¹⁰⁷ The rule ceases when the reason ceases. Therefore, if there is any-

¹⁰⁴ *Irons v. Bank* (C. C.) 17 Fed. 308.

¹⁰⁵ *May v. McQuillan*, 129 Mich. 392, 89 N. W. 45.

¹⁰⁶ *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448, 1 Cumming, Cas. Priv. Corp. 948; *Wheelock v. Kost*, 77 Ill. 296; *Aultman's Appeal*, 98 Pa. 516; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Rosevelt v. Brown*, 11 N. Y. 148; *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199; *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 South. 149; *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Crease v. Babcock*, 10 Metc. (Mass.) 525; *First Nat. Bank v. Hingham Manuf'g Co.*, 127 Mass. 563; *Hale v. Walker*, 31 Iowa, 344, 7 Am. Rep. 137; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *Hoare's Case*, 2 Johns. & H. 229; *Moore v. Jones*, 3 Woods, 53, Fed. Cas. No. 9,769; note, 15 C. C. A. 133, 134; *State v. Bank of New England*, 70 Minn. 398, 73 N. W. 153, 68 Am. St. Rep. 538. "It is now too well settled to be any longer a question that when stock is transferred to a man as collateral, and stands in his name, he incurs liability as a stockholder just as if he were the actual beneficial owner. Most especially is this just and right as to creditors who trust to his name, and have no notice of the secret trust upon which the stock is held." *Aultman's Appeal*, *supra*.

¹⁰⁷ *Welles v. Larrabee* (C. C.) 36 Fed. 866, 2 L. R. A. 471.

thing on the stock books of the corporation showing that the transferee takes as pledgee, he incurs no liability.¹⁶⁸ As was said by the supreme court of the United States, "It has never, to our knowledge, been held that a mere pledgee of stock is chargeable, where he is not registered as owner."¹⁶⁹ A pledgee, for instance, is not liable if the stock stands in his name on the books "as pledgee," or if it expressly appears to be held "as collateral."¹⁷⁰

Under a statute rendering stockholders liable for corporate debts, but providing that no person holding stock as collateral security shall be personally subject to such liability, but the person pledging such stock shall be considered as holding the same, it has been held that the pledgee of shares cannot be held liable as a shareholder.¹⁷¹ And it has also been held that this is true where the shares are issued by the corporation itself as collateral.¹⁷²

Trustees, Executors, Agents, etc.

The same doctrine applies, in the absence of special statutory provision, where stock is held in trust. A person who appears on the books of the corporation as the absolute owner of stock will be personally liable to the creditors of the corporation, although he may in fact hold the stock as trustee, personal representative, guardian, etc.¹⁷³ But, by the weight of authority, if he appears on the books as holding, not in his own right, but as "trustee," "executor," etc., he will not be personally liable.¹⁷⁴ Of course, he may be liable in his

¹⁶⁸ *Anderson v. Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478; *Beal v. Bank*, 15 C. C. A. 128, 67 Fed. 816; *Henkle v. Manufacturing Co.*, 39 Ohio St. 547; *First Nat. Bank v. Hingham Manuf'g Co.*, 127 Mass. 563; note, 15 C. C. A. 134; *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844. If the stock ledger shows that one to whom a certificate was issued is pledgee, it is sufficiently shown, through the certificate, the book from which it was taken and other books of the corporation set him down as an ordinary stockholder. In *re Noyes Bros.* (D. C.) 186 Fed. 977. But see *Grew v. Breed*, 10 Metc. (Mass.) 569.

¹⁶⁹ *Anderson v. Warehouse Co.*, supra.

¹⁷⁰ See cases in note 168, supra.

¹⁷¹ *McMahon v. Macy*, 51 N. Y. 155; *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Matthews v. Albert*, 24 Md. 527.

¹⁷² *Union Sav. Ass'n v. Seligman*, supra; *Burgess v. Seligman*, supra; *Matthews v. Albert*, supra.

¹⁷³ See *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Welles v. Larrabee* (C. C.) 36 Fed. 866, 2 L. R. A. 471; *Crease v. Babcock*, 10 Metc. (Mass.) 525, 545; *Grew v. Breed*, Id. 569; *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199; *Kerr v. Urle*, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493; *Foot v. Illinois Trust & Savings Bank*, 194 Ill. 600, 62 N. E. 834.

¹⁷⁴ *Welles v. Larrabee* (C. C.) 36 Fed. 866, 2 L. R. A. 471; dictum in *Adderly v. Storm*, 6 Hill (N. Y.) 628. Contra, *Grew v. Breed*, 10 Metc. (Mass.) 569.

representative capacity, to the extent of the trust estate.¹⁷⁶ It is sometimes expressly provided by statute that persons holding stock as executors, trustees, etc., shall not be personally subject to any liabilities as stockholders, but that the estates and funds in their hands shall be liable.¹⁷⁶

A broker or other agent who purchases stock for his customer, but who takes the title in his own name, on the stock book of the company, is liable as a stockholder.¹⁷⁷

Election between Apparent and Real Owner.

Where the person who appears on the books of the corporation as the owner of stock is not the real owner, creditors cannot hold both him and the real owner to the statutory liability; nor can they hold one of them after an unsuccessful attempt, with knowledge of the facts, to hold the other. They must elect between them. Thus, it was held that a person who was entered on the books of a national bank as the owner of stock, but who was admitted to hold the stock in trust for the real owner, could not be held liable to creditors of the bank after the real owner had been proceeded against to judgment, though nothing was realized upon the judgment.¹⁷⁸

Assignees in Bankruptcy or Insolvency.

The assignees in bankruptcy or insolvency of a stockholder are not subject to the statutory liability of the bankrupt or assignor for debts of the corporation.¹⁷⁹ It has been so held even where the assignee had attended and voted at meetings of the corporation, and done other acts of ownership of the stock.¹⁸⁰

Married Women.

Where a married woman is not only capable of holding stock in a corporation, but is also, by statute, capable of contracting as a feme sole, it is clear enough that she may be held liable as a shareholder to the creditors of a corporation. The question is not so clear, however, in those jurisdictions where the common-law disability of married women to contract has not been wholly removed. In the federal courts it is held that, where a married woman is capable of holding stock in a corporation, she may be held liable, as a shareholder in a

¹⁷⁶ See *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 884; *Sayles v. Bates*, 15 R. I. 842, 5 Atl. 497.

¹⁷⁶ There is such a provision in the national banking act. Rev. St. U. S. § 5152 [U. S. Comp. St. 1901, p. 8465].

¹⁷⁷ *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130.

¹⁷⁸ *Yardley v. Wilgus* (C. C.) 56 Fed. 985.

¹⁷⁹ *American Fille Co. v. Garrett*, 110 U. S. 238, 4 Sup. Ct. 90, 28 L. Ed. 149; *Gray v. Coffin*, 9 Cush. (Mass.) 192.

¹⁸⁰ *Gray v. Coffin*, 9 Cush. (Mass.) 192.

national bank, for the contracts and debts of the bank, even though, by the law of the particular jurisdiction, she may not have the capacity to contract. The reason that she may be held is that her liability is imposed by the statute, and does not rest upon contract.¹⁸¹ The same rule must apply to other corporations.

Death of Stockholder—Survival of Liability.

If the liability imposed by a statute upon a stockholder for debts of the corporation is contractual, the cause of action does not abate upon his death, but survives, and may be enforced against his personal representatives.¹⁸² But if, on the other hand, the liability is penal, it is within the rule, "Actio personalis moritur cum persona," and abates.¹⁸³ The estate of a deceased stockholder is liable for debts contracted after his death, and while it owns the stock.¹⁸⁴

Forfeiture of Stock.

One whose stock is forfeited for nonpayment of calls is not liable to creditors either for the unpaid balance of his subscription, or under statutes imposing additional liability, where the forfeiture is such as to deprive the stockholder of his character as such; but this is true only when the forfeiture is in good faith, and not collusive or fraudulent.¹⁸⁵

Holders of Unauthorized Stock.

Holders of certificates of unauthorized stock, as of an unauthorized increase of stock, incur no liability by virtue thereof to creditors who did not rely on the validity of the stock, so as to give rise to an estoppel on the part of the holders to deny its validity.¹⁸⁶ If there was no power at all to increase the stock, no estoppel can arise as against creditors, for they are chargeable with notice of the want of power.¹⁸⁷ Where, however, the increase was within the power of the corporation, so that it could have lawfully been made, but the

¹⁸¹ Witters v. Sowles (C. C.) 32 Fed. 767; Id., 35 Fed. 640, 1 L. R. A. 64; Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531; Robinson v. Turrentine (C. C.) 59 Fed. 554; note, 15 C. C. A. 132, 133; In re Reciprocity Bank, 22 N. Y. 9; Sayles v. Bates, 15 R. I. 342, 5 Atl. 497.

¹⁸² Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; Cochran v. Wiechers, 119 N. Y. 390, 23 N. E. 803, 7 L. R. A. 553; Grew v. Breed, 10 Metc. (Mass.) 569; Mechanics' Sav. Bank v. Fidelity Ins., Trust & Safe Deposit Co. (C. C.) 87 Fed. 113; Potter v. Mortimer, 114 Ill. App. 422, affirmed 213 Ill. 178, 72 N. E. 817.

¹⁸³ Diversey v. Smith, 103 Ill. 878, 42 Am. Rep. 14; Id., 9 Ill. App. 437.

¹⁸⁴ Bailey v. Hollister, 26 N. Y. 112.

¹⁸⁵ Mills v. Stewart, 41 N. Y. 384. See ante, p. 309, as to forfeitures, and their effect.

¹⁸⁶ Sayles v. Brown (C. C.) 40 Fed. 8.

¹⁸⁷ Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 963.

corporation merely failed to take the preliminary steps required by the charter, so that the creditors were misled, the holders will be estopped to deny the validity of the stock to escape liability.¹⁸⁸

SAME—WHO MAY ENFORCE STATUTORY LIABILITY.

232. Unless otherwise provided, no one but a creditor can enforce the statutory liability of a stockholder. It cannot be enforced by the corporation, nor by its assignee for the benefit of creditors, nor by its assignee in bankruptcy or insolvency, nor a receiver.

233. A stockholder who is also a creditor is entitled to the benefit of the statute.

The statutory liability of stockholders for the debts of the corporation is created in favor of the creditors of the corporation, and not in any legal sense for the benefit of the corporation. It is not like the liability of stockholders for unpaid subscriptions. The liability is to the creditors, and not to the corporation. It follows that the liability can be enforced only by the creditors. In the absence of a statute authorizing it, it cannot be enforced by the corporation, nor by its assignee for the benefit of creditors, nor by its receiver or assignee in bankruptcy. Neither the corporation nor its assignee or receiver has any legal or equitable title, right, or interest therein.¹⁸⁹ Sometimes the right to enforce this liability is expressly given by statute to others than the creditors.¹⁹⁰

Stockholders Who are Creditors or Officers.

Under a statute making stockholders liable for the debts of the corporation to the extent of their shares, in addition to the amount that may be due on their shares, stockholders who are themselves

¹⁸⁸ *Veeder v. Mudgett*, 95 N. Y. 295.

¹⁸⁹ *Dutcher v. Bank*, 12 Blatchf. 435, Fed. Cas. No. 4,203; *Bristol v. Sanford*, 12 Blatchf. 341, Fed. Cas. No. 1,893; *Jacobson v. Allen* (C. C.) 12 Fed. 454; *Farnsworth v. Wood*, 91 N. Y. 308; *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415; *Runner v. Dwiggins*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; *Mechanics' Sav. Bank v. Fidelity Ins. Trust & Safe Deposit Co.* (C. C.) 87 Fed. 113. *Contra*, *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893.

¹⁹⁰ See *Story v. Furman*, 25 N. Y. 214; *Howarth v. Ellwanger* (C. C.) 86 Fed. 54; *Kissebeth v. Prescott* (C. C.) 95 Fed. 357; *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240; *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714.

creditors are entitled to come in equally with the other creditors.¹⁹¹ A creditor is not debarred from enforcing the liability because he is a director.¹⁹² It has been held that such a statute is not intended to, and does not, include directors to whom the corporation is indebted for salaries.¹⁹³ When a stockholder who is liable severally and jointly with the other stockholders for the debts of the corporation is himself a creditor of the corporation, he cannot generally maintain an action at law against another stockholder, or seize his property on execution, where that remedy is given creditors; for that would enable him to collect from one stockholder not only all that such stockholder is ultimately bound to pay, but also all that the entire body of stockholders, including himself, is bound to pay, thus, as it was put by Judge Thomas, "collecting with his right hand what he must pay with his left." His remedy is by bill in equity for contribution.¹⁹⁴

SAME-REMEDIES OF CREDITORS AGAINST STOCKHOLDERS.

234. The liability of stockholders on account of their stock may be enforced in an action at law by a receiver or an assignee in bankruptcy or insolvency, or an assignee under a voluntary assignment for the benefit of creditors; but only creditors can enforce the statutory liability, unless otherwise provided.

235. To enforce the common-law liability of stockholders on their subscriptions, creditors

(a) Cannot maintain an action at law, unless allowed to do so by statute.

(b) But they may maintain a bill in equity.

(c) By the weight of authority, the suit must be in the nature of a creditors' bill, on behalf of all creditors who may come in.

(d) By the weight of authority, all the stockholders need not be made parties, but the suit may be brought against a single stockholder, leaving him to seek contribution from the others.

(e) The corporation must be made a party, but its nonjoinder may be waived by the stockholder.

(f) Statutory remedies are given in some states, but they do not exclude the remedy in equity, unless by their express terms.

236. The remedy of creditors to enforce the statutory liability will depend upon the nature of the liability, unless the remedy is

¹⁹¹ *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; *Oswald v. Minneapolis Times Co.*, 65 Minn. 249, 68 N. W. 15.

¹⁹² *Janney v. Minneapolis Industrial Exposition*, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273.

¹⁹³ *McDowall v. Sheehan*, 129 N. Y. 200, 29 N. E. 290.

¹⁹⁴ *Thayer v. Tool Co.*, 4 Gray (Mass.) 75, 78. And see *Bissit v. Navigation Co.* (C. C.) 15 Fed. 353; *Bailey v. Bancker*, 3 Hill (N. Y.) 188, 38 Am. Dec. 625; *Cocking v. Ward* (Tenn. Ch. App.) 48 S. W. 287; *Milford Sav. Bank v. Joslyn*, 59 Kan. 778, 53 Pac. 756. Cf. *Myers v. Sierra Val. Stock & Agricultural*

prescribed by the statute. Though there is confusion and conflict in the cases, by the weight of authority,

- (a) If the statute prescribes a remedy it is exclusive.
- (b) If the object of the statute is to provide a fund out of which all the creditors are to be paid pro rata, and to make the stockholders contribute to it in proportion to their stock, the remedy is by general creditors' bill, or suit of that nature, and an action at law by a single creditor will not lie. Nor can the creditors severally maintain a bill in equity against the stockholders.
- (c) But if each stockholder is made severally liable directly to creditors, and his liability is fixed, and does not depend upon the liability of the others, any creditor who has observed conditions precedent* may sue a single stockholder at law.
- (d) In such a case each stockholder must be sued separately.
- (e) In such a case some courts hold that an action at law is the only remedy, while others allow an action at law, or a suit in equity, at the option of the creditor.

236½. Statutes imposing liability upon stockholders have no extra-territorial operation. If they are penal, the liability created by them will not be enforced in another state; but if they are contractual, imposing an absolute and direct liability upon stockholders in favor of creditors, the liability may be enforced in another state, unless the statute has provided for its enforcement by a particular form of procedure which can be pursued only in the home state.

Common-Law Liability on Subscriptions, etc.—Action by Assignee for Creditors or in Bankruptcy.

Unpaid subscriptions, being a part of the assets of the corporation for the payment of its debts, pass to the assignee under a general assignment for the benefit of creditors, and may be enforced by him for the creditors.¹⁸⁸ And they also pass to, and an action may be maintained by, an assignee in bankruptcy or receiver of the corporation.¹⁸⁹ In these cases the assignee or receiver stands in the place of the cor-

Ass'n, 122 Cal. 669, 55 Pac. 689. It was held in a later Massachusetts case that a creditor, who is also a member of a corporation, cannot maintain a bill in equity to enforce the personal liability of the stockholders under a statute making them liable for debts incurred before payment in full of the capital stock, and that one to whom a stockholder creditor has assigned his claim, for the sole purpose of enabling him to bring such a suit, is in no better position. *Potter v. Machine Co.*, 127 Mass. 592, 34 Am. Rep. 428.

* As to necessity for judgment and execution unsatisfied against the corporation, see post, p. 584.

¹⁸⁸ *Germantown Pass. Ry. Co. v. Fidler*, 60 Pa. 124, 100 Am. Dec. 546; *Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73; *Chamberlain v. Bromberg*, 83 Ala. 576, 8 South. 434.

¹⁸⁹ *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731, 1 Cumming, Cas. Priv. Corp. 818; *Dayton v. Borst*, 81 N. Y. 435.

poration, and is the only party to sue for unpaid subscriptions.¹⁹⁷ He may maintain an action at law. He is not, like a creditor, bound to sue in equity.

Same—Action at Law by Creditors.

Sometimes, by statute, creditors of a corporation are given a remedy by action at law or garnishment to subject unpaid subscriptions to stock to the satisfaction of their claims, when they have exhausted their remedies against the corporation.¹⁹⁸ But at common law a creditor cannot maintain an action at law against stockholders for unpaid subscriptions, for there is no privity of contract between them, and, furthermore, unpaid subscriptions cannot thus be appropriated by one creditor to the exclusion of the others. As was pointed out by Chief Justice Waite: "The liability of stockholders to creditors for unpaid subscriptions is through the corporation, not direct. * * * The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and, when sued for the money he owes, it must be in a way to put what he pays directly or indirectly into the treasury of the corporation for distribution according to law." He then adds that "no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law, so as to appropriate it exclusively to himself."¹⁹⁹

Same—General Creditors' Bill in Equity—Suit for Appointment of Receiver.

All the courts agree that a judgment creditor of a corporation, who has exhausted his remedy at law, may maintain a suit in equity on his own behalf, and on behalf of such other creditors of the corporation as may become parties with him, against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in so much as may be due from them, respectively, to the corporation on account of their capital stock, or on account of property unlawfully distributed to them, as may be sufficient to pay the debts of the complainant and such other creditors as may join.²⁰⁰

¹⁹⁷ Rankine v. Elliott, 16 N. Y. 377.

¹⁹⁸ See World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724; Henderson v. Hall, 134 Ala. 455, 32 South. 840, 63 L. R. A. 678.

¹⁹⁹ Patterson v. Lynde, 106 U. S. 520, 1 Sup. Ct. 432, 27 L. Ed. 265; Ladd v. Cartwright, 7 Or. 329; Brundage v. Mining Co., 12 Or. 322, 7 Pac. 814.

²⁰⁰ See Burke v. Smith, 16 Wall. 390, 21 L. Ed. 361; Ogilvie v. Insurance Co., 22 How. 380, 16 L. Ed. 349, 1 Cumming, Cas. Priv. Corp. 814; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Holmes v. Sherwood (O. C.) 16 Fed. 725; Bissit v. Navigation Co. (C. C.) 15 Fed. 353; Spear v. Grant, 16 Mass. 9; Mann v. Pentz, 3 N.

The bill must be a general creditors' bill, so as to allow other creditors to come in; for all the creditors are entitled to share in the assets of the corporation, and one cannot appropriate the whole, or more than his proportion.²⁰¹ A creditor, instead of maintaining such a suit may sue for the appointment of a receiver to collect and distribute the assets of an insolvent corporation, including unpaid subscriptions.²⁰²

Same—Parties.

By the great weight of authority, a creditor may, by a general creditors' bill, proceed against a single delinquent stockholder of an insolvent corporation, and compel him to pay the whole amount due from him to the corporation on account of his subscription, or on account of corporate property unlawfully received by him, if necessary in order to satisfy his debt, without making other stockholders parties, and without any account being taken of other indebtedness of the corporation, the stockholder proceeded against being left to pursue his remedy against the other stockholders for contribution.²⁰³

In Pennsylvania and in other states, it seems, the rule is different. It is there held that a bill filed by a creditor of an alleged insolvent corporation against one or several stockholders, to compel payment of their subscriptions, is a proceeding to enforce the equitable obligations of the stockholders, and that, inasmuch as only so much of the unpaid capital as is necessary for the payment of debts can be called in, and that can be done only when all the other assets are exhausted, an account must be taken of the amount of debts, assets, and unpaid capital, and a decree be made for an assessment of the amount due by

Y. 415; *Hastings v. Drew*, 76 N. Y. 9; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Adler v. Manufacturing Co.*, 18 Wis. 63; *Barron v. Paine*, 83 Me. 312, 22 Atl. 218; *Henry v. Railroad Co.*, 17 Ohio, 187; *Umsted v. Buskirk*, 17 Ohio St. 113; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Brundage v. Mining Co.*, 12 Or. 322, 7 Pac. 814; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

²⁰¹ See *Patterson v. Lynde*, 106 U. S. 520, 1 Sup. Ct. 432, 27 L. Ed. 265; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Cleveland Rolling-Mill Co. v. Texas & St. L. Ry. Co. (C. C.)* 27 Fed. 250; *First Nat. Bank v. Pea-rey (C. C.)* 75 Fed. 154.

²⁰² *Rankine v. Elliott*, 16 N. Y. 377; *Mann v. Pentz*, 8 N. Y. 415; *Dayton v. Borst*, 31 N. Y. 435; *Brassey v. Railroad Co. (C. C.)* 19 Fed. 663. See *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Platt v. Railroad Co. (C. C.)* 65 Fed. 872.

²⁰³ *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Ogilvie v. Insurance Co.*, 22 How. 380, 16 L. Ed. 849, 1 Cumming, Cas. Priv. Corp. 814; *Marsh v. Burroughs*, Fed. Cas. No. 9,112; *Holmes v. Sherwood (C. C.)* 16 Fed. 725; *Bartlett v. Drew*, 57 N. Y. 587; *Pierce v. Construction Co.*, 38 Wis. 253; *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 675, 30 Pac. 776, 29 Am. St. Rep. 158; *Brundage v. Mining Co.*, 12 Or. 322, 7 Pac. 314.

each stockholder.²⁰⁴ This does not apply where an assignee for the benefit of creditors sues to recover unpaid subscriptions, and the whole of them is required to pay the debts of the company.²⁰⁵

The corporation must be made a party to a suit by its creditor against delinquent stockholders, for otherwise it would not be bound by the judgment therein. But, if a stockholder sees fit to go to trial and judgment without objecting to the nonjoinder of the corporation, he cannot afterwards complain.²⁰⁶

Same—Necessity for Calls.

Where, by the charter or by-laws, or by the terms of the subscription itself, a call is necessary to render a subscriber liable on his subscription,²⁰⁷ an unpaid subscription cannot be enforced, either by an assignee for the benefit of creditors, or by a creditor, until a call has been duly made.²⁰⁸ But a court of equity will compel the directors to make the calls necessary to render subscribers liable,²⁰⁹ or it will, in effect, make the call itself, by a decree calling upon the subscribers to pay. Calls in such a case need not have been made by the company.²¹⁰

Same—Statutory Remedies.

In some states statutory remedies are given creditors of a corporation, against delinquent stockholders, which do not exist at common law, nor in equity without the aid of the statute. Sometimes an action at law is allowed directly against the delinquent stockholder, or the process of garnishment is allowed. Sometimes a creditor who has recovered judgment against the corporation, on which execution has been returned unsatisfied, is allowed to issue execution directly against the stockholders. Unless the statutory remedy is expressly made exclusive, it does not prevent a creditor from pursuing his equitable remedy.²¹¹

²⁰⁴ Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166; Bell's Appeal, 115 Pa. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Wetherbee v. Baker, 35 N. J. Eq. 501.

²⁰⁵ Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73.

²⁰⁶ Potter v. Dear (Cal.) 27 Pac. 676; Id., 95 Cal. 578, 30 Pac. 777; Wetherbee v. Baker, 35 N. J. Eq. 501.

²⁰⁷ Ante, p. 812, as to the necessity for calls.

²⁰⁸ Germantown Pass. Ry. Co. v. Fittler, 60 Pa. 124, 100 Am. Dec. 546.

²⁰⁹ Germantown Pass. Ry. Co. v. Fittler, 60 Pa. 124, 100 Am. Dec. 546.

²¹⁰ Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Henry v. Railroad Co., 17 Ohio, 187; Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; Dalton & M. R. Co. v. McDaniel, 56 Ga. 191; Allen v. Grant, 122 Ga. 552, 50 S. E. 494.

²¹¹ Potter v. Dear (Cal.) 27 Pac. 676; Id., 95 Cal. 578, 30 Pac. 777; Holmes v. Sherwood (C. C.) 16 Fed. 725; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74.

Same—Enforcement in Foreign Jurisdiction.

The liability of a stockholder on an unpaid subscription, being contractual, may be enforced in another state, by the corporation,²¹² or by its assignee or receiver.²¹³ If a call or assessment has been made by order of the court by which a receiver has been appointed, the order is conclusive as to the amount of the assessment, and the right of the receiver to sue therefor;²¹⁴ but the stockholder, when sued in another state, may interpose any personal defense.²¹⁵ If a remedy is given to creditors by statute in the state where suit is brought by action at law or garnishment, a creditor may pursue that remedy.²¹⁶ If permissible by the law of the forum, he may proceed by creditors' bill.²¹⁷

Statutory Liability.

It is impossible to reconcile the decisions in the different states as to what is the proper remedy to enforce the statutory liability of stockholders for corporate debts.

As we have seen, the statutory liability of stockholders can only be enforced by the creditors. It cannot be enforced by an assignee in bankruptcy or insolvency, nor by an assignee under a voluntary assignment for the benefit of creditors.²¹⁸

Where the Statute Gives a Remedy.

It seems clear that where a liability is imposed by statute upon stockholders for the debts of the corporation, which did not exist at common law, or in equity, independently of the statute, and the statute provides a remedy by which to enforce the liability, that remedy is exclusive, and must be strictly followed.²¹⁹ Thus, it has been held

²¹² *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194; *Giesen v. London & Northwest American Mortg. Co.*, 102 Fed. 584, 42 C. C. A. 515.

²¹³ *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541; *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189. But see *Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

²¹⁴ *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545.

²¹⁵ *Great Western Tel. Co. v. Purdy*, 162 U. S. 829, 16 Sup. Ct. 810, 40 L. Ed. 986. Cf. *Bank of China v. Morse*, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676.

²¹⁶ *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

²¹⁷ *Rule v. Omega Stove & Grate Co.*, 64 Minn. 326, 67 N. W. 60.

²¹⁸ *Ante*, p. 572.

²¹⁹ *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; *Morley v. Thayer* (C. C.) 3 Fed. 737; *Lowry v. Inman*, 46 N. Y. 120; *Dauchy v. Brown*, 24 Vt. 197; *Knowlton v. Ackley*, 8 Cush. (Mass.) 93; *Cambridge Water Works v. Somerville Dyeing & Bleaching Co.*, 4 Allen (Mass.) 239; *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. This is true whether the proceedings are taken in the state creating the corporation or elsewhere,

that, if the statute gives a remedy by action at law against a stockholder or stockholders, a bill in equity will not lie.²²⁰ So, where a charter only authorizes the taking of the individual property of stockholders on execution on a judgment against the corporation, and provides that the same process may be used and enforced by such stockholders against the property of the other stockholders, so as to compel a ratable contribution by all, no general individual liability is created for which a personal action will lie.²²¹

Same—Where No Remedy is Prescribed.

When the statute provides no remedy, there is more difficulty, and it is here that we meet with confusion and conflict in the decisions. Whether the remedy is at law or in equity, and whether suit must be brought on behalf of all the creditors, or may be brought by one creditor against a single stockholder, must depend upon the nature of the liability created. Attention, therefore, must be given to the language of the particular statute. By the weight of authority, if the object of the statute is to provide a fund out of which all the creditors are to be paid, share and share alike, and to make the stockholders contribute to it in proportion to their stock, the remedy is by a general creditors' bill, or suit of that nature, in which an account may be taken of the debts and stock, and a pro rata distribution may be made among the several shareholders, and the fund thus obtained may be paid pro rata to all the creditors. And, under such a statute, an action at law by a single creditor against a single stockholder will not lie.²²²

and whether in the state or federal courts. *Fourth Nat. Bank v. Francklyn*, *supra*.

²²⁰ *Morley v. Thayer*, *supra*; *Shickell v. Berryville Land & Improvement Co.*, 99 Va. 88, 87 S. E. 813.

²²¹ *Lowry v. Inman*, *supra*.

²²² *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864. In this case the statute declared that the stockholders should be "liable and held bound * * * for any sum not exceeding twice the amount of their shares," and it was held that an action at law could not be maintained by a single creditor against two of a large number of stockholders. See, also, *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376; *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *Crease v. Babcock*, 10 Metc. (Mass.) 525, 531; *Harris v. First Parish*, 23 Pick. (Mass.) 112; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Cleveland v. Burnham*, 55 Wis. 598, 13 N. W. 677, 680; *Jones v. Jarman*, 34 Ark. 340; *Johnson v. Fischer*, 30 Minn. 173, 14 N. W. 799; *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613. See *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Maine Trust & Banking Co. v. Southern Loan & Trust Co.*, 92 Me. 444, 43 Atl. 24; *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176. The decisions in New York are to the contrary, and allow an action at law. See cases cited in notes 224, 227, *infra*.

Nor can the creditors severally maintain a bill in equity against the stockholders.²²²

But if, on the other hand, each stockholder is made severally liable directly to creditors, and his liability is fixed, and does not depend upon the liability of the other stockholders, so that there is no necessity to bring in the other stockholders or creditors, any creditor who has recovered judgment against the corporation, and had execution returned unsatisfied, where this is necessary, or without this where it is unnecessary, may maintain an action at law against a single stockholder.²²⁴ Where the liability of the stockholders is several, and an action at law is brought, each must be sued separately.²²⁵

Where the statute thus imposes an unconditional, original, and immediate liability on the part of a stockholder to creditors, it is held by the supreme court of the United States, and other courts, that the remedy must be sought at law, and not in equity, unless there are some peculiar circumstances giving rise to a claim for equitable relief, but that a suit in equity will lie if there are such circumstances. In other words, "the jurisdiction may be regarded as concurrent, both at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises."²²⁶ In New York and some other jurisdictions, however, even where an action at law will lie, it is held that the creditor may, at his election, go into equity.²²⁷

A creditors' bill in equity, or suit in the nature of a creditors' bill, will lie, where it is sought to enforce, not only the statutory liability of the stockholder, but also to compel payment of unpaid subscriptions.²²⁸

²²² *Crease v. Babcock*, 10 Metc. (Mass.) 525.

²²⁴ *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 968. And see *Hall v. Klinck*, 25 S. C. 348, 60 Am. Rep. 505; *Fuller v. Ledden*, 87 Ill. 310; *Buchanan v. Meisser*, 105 Ill. 638; *Thompson v. Meisser*, 108 Ill. 359; *Schallucky v. Field*, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Garrison v. Howe*, 17 N. Y. 458; *Weeks v. Love*, 50 N. Y. 568; *Western Nat. Bank v. Reckless* (C. C.) 96 Fed. 70.

²²⁵ *Abbey v. Dry Goods Co.*, 44 Kan. 415, 24 Pac. 426; *Perry v. Turner*, 55 Mo. 418.

²²⁶ *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034; *Wincock v. Turpin*, 96 Ill. 135; *Tunesma v. Schuttler*, 114 Ill. 156, 28 N. E. 605; *New York Life Ins. Co. v. Beard* (C. C.) 80 Fed. 66.

²²⁷ *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Garrison v. Howe*, 17 N. Y. 458; *Mathez v. Neidig*, 72 N. Y. 100; *Weeks v. Love*, 50 N. Y. 568; *Pfohl v. Simpson*, 74 N. Y. 137; *Briggs v. Penniman*, 8 Cow. (N. Y.) 887, 18 Am. Dec. 454.

²²⁸ *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Minneapolis Paper Co. v. Swinburne Printing Co.*, 66 Minn. 378, 69 N. W.

Same—Enforcement in Foreign Jurisdiction.

A statute imposing a liability on stockholders for debts can of itself have no force beyond the jurisdiction of the state which enacted it. If the statute is penal in its nature, it will not be enforced in another state.²²⁹ As a rule, however, such statutes are not penal.²³⁰ And, although the liability is declared by statute, it is voluntarily assumed by those who become stockholders, and is contractual in its nature.²³¹

It follows that, if a statute imposes an absolute and direct liability upon stockholders in favor of creditors, the liability may be enforced in any state,²³² unless the statute has provided for its enforcement by a

144; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888. So it has been held where the corporation is notoriously insolvent. *Latimer v. Citizens' State Bank*, 102 Iowa, 162, 71 N. W. 225.

²²⁹ Post, p. 599. Where a Rhode Island statute, requiring a corporation to file annually a certificate setting forth the amount of assessments voted by the company and paid in and the amount of existing debts, provided that, if it should fail to do so, the stockholders should be jointly and severally liable for all the debts of the company, it was held that the statute, being penal, imposed no liability which could be enforced against stockholders in Maryland. *Sayles v. Brown* (C. C.) 40 Fed. 8.

²³⁰ *Ouykendall v. Miles* (C. C.) 10 Fed. 342.

²³¹ *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; *Whitman v. National Bank of Oxford*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. Cf. *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702. California stockholders in a Colorado corporation whose charter specified that one purpose of the incorporation was the transaction of business by the corporation in California must be deemed to have contracted with reference to the provisions of the California statute, imposing the same personal liability upon stockholders of foreign corporations doing business within the state as upon stockholders in domestic corporations, and are bound thereby, so far at least as such liability arises from the corporate business carried on in California. *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125.

²³² *Flash v. Conn*, supra; *Whitman v. National Bank of Oxford*, supra; *Oushing v. Perot*, 175 Pa. 66, 34 Atl. 447, 34 L. R. A. 737, 52 Am. St. Rep. 835; *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; *Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611; *Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62. A special receiver appointed by a court of Minnesota in a suit in equity brought under the statutes of that state by creditors of an insolvent corporation to determine the individual liability of stockholders, and charged with the duty of enforcing such liability for the benefit of all the creditors, may maintain an action at law in a federal court in another state against a stockholder residing therein. *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240; *Kirtley v. Holmes*, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; *Hale v. Hilliker*

particular form of procedure which can be pursued only in the home state.²²² Thus, where a corporation was organized under a statute which provided that stockholders should be severally individually liable to creditors, to an amount equal to the stock held by them, respectively, for all debts and contracts made by the company until the whole amount of capital stock should be paid in and a certificate thereof recorded, it was held by the supreme court of the United States that the liability might be enforced against a stockholder in another state.²²⁴ "The liability," said the court, "is fixed, and does not depend on the liability of other stockholders. There is no necessity of bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other can." So, under the constitution and statutes of Kansas, allowing a judgment creditor of a corporation after a return of nulla bona to enforce judgment against any stockholder by separate suit, and providing that a stockholder who pays more than his proportion of a corporate debt may compel contribution from the other stockholders, and that no stockholder shall be liable to pay debts of the corporation beyond the amount due on his stock and an additional amount equal to the stock owned by him, it was held by the same court that an action to enforce the liability of a stockholder can be maintained in any court of competent jurisdiction.²²⁶ "Whatever else may be said about the remedy," said the court, "it is direct, certain, and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations." The same decision has been reached by many of the state courts in suits based upon the provisions of the Kansas constitution and statutes.²²⁸ It has also been held by the supreme court of the United States that the action of the Rhode Island court in refusing to recognize the right of a creditor, after recovery of a judgment against a Kansas corporation in the circuit court of the United States sitting within that state, and return of execution unsatisfied, to maintain an action in the Rhode Island court against a stockholder to recover in satisfaction of his judgment, was a failure to give the judgment full faith and credit as

(C. C.) 109 Fed. 273. See, also, *King v. Cochran*, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922. Contra, *Converse v. Stewart*, 105 App. Div. 478, 94 N. Y. Supp. 310. Cf. *Hale v. Coffin* (C. C.) 114 Fed. 568; *Hilliker v. Hale*, 117 Fed. 220, 54 C. C. A. 252; *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173.

²²² Post, p. 583.

²²⁴ *Flash v. Conn*, supra.

²²⁶ *Whitman v. National Bank of Oxford*, supra.

²²⁸ See many of the cases cited in note 232, supra.

required by the federal constitution.²³⁷ The judgment against the corporation is conclusive upon the stockholder, unless impeached for want of jurisdiction or fraud.²³⁸

On the other hand, where the statute imposing the liability prescribes a particular remedy for its enforcement, that remedy, as we have seen, is exclusive;²³⁹ and the liability cannot be enforced in another state, at least unless the result sought to be secured by the remedy prescribed can be effected by an appropriate procedure in the foreign state.²⁴⁰ Thus, if the remedy prescribed is by creditors' bill, or like procedure, in which all the creditors may join, and all the stockholders must be made defendants, the object being to provide a fund for the creditors to which all the stockholders are to contribute proportionally, the liability cannot be enforced in another state by action at law by a single creditor against a single stockholder,²⁴¹ nor by creditors' bill, since the procedure prescribed is available only in the home state, where the corporation and the stockholders can be reached and the court can adjust

²³⁷ *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619, reversing 20 R. I. 466, 40 Atl. 341. See, also, *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111.

²³⁸ *Hancock Nat. Bank v. Farnum*, supra; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36; *American Nat. Bank v. Supplee*, 115 Fed. 657, 52 C. C. A. 293. The judgment is not so conclusive as to prevent the stockholder from showing that because the corporate obligation was ultra vires he was not liable under the constitution and laws of the home state. *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093.

²³⁹ Ante, p. 578. A stockholder's liability in an Ohio corporation cannot be enforced outside of the jurisdiction of that state, on the theory that the Ohio constitution is, for that purpose, self-executing, when it provides for the individual liability of the stockholders, where an action in the Ohio courts alone is contemplated by a statute which was enacted in pursuance of this constitutional provision, and itself provides for the procedure and states the remedy. *Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co.*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803.

²⁴⁰ *Lowry v. Inman*, 46 N. Y. 119; *Bank of North America v. Rindge*, 154 Mass. 203, 27 N. E. 1015, 13 L. R. A. 56, 26 Am. St. Rep. 240; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928; *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747; *Tuttle v. National Bank of Republic*, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; *Finney v. Guy*, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486, s. c. 111 Wis. 296, 87 N. W. 255, affirmed 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839; *Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538, 46 L. R. A. 467, 76 Am. St. Rep. 192; *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173; *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; *Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co.*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803; *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 77 N. E. 877.

²⁴¹ *Erickson v. Nesmith*, 15 Gray (Mass.) 221.

all conflicting questions as to the indebtedness of the corporation, who were stockholders, and what are the equities between them.²⁴²

The existence and character of the liability is to be determined by the statutes of the state creating it and by their judicial interpretation by its courts, which must, of course, be pleaded and proved as facts.²⁴³ A defense, as, for example, a right of set-off, which is open to the stockholder under the laws of the home state, is available to him when sued in another state.²⁴⁴

SAME-NECESSITY FOR JUDGMENT AGAINST CORPORATION.

237. Ordinarily recovery of a judgment against the corporation, and return of execution unsatisfied, is a condition precedent to a suit by creditors against stockholders. There is, however, some conflict in the decisions.

It is well settled that, unless otherwise provided by statute,²⁴⁵ a creditor cannot maintain a suit in equity against stockholders to compel payment of a balance due on their subscriptions, or repayment of funds paid out to them, until he has exhausted his legal remedy against the

²⁴² *Erickson v. Neamith*, 4 Allen (Mass.) 233; *McLaughlin v. O'Neill*, 7 Wyo. 187, 51 Pac. 243; *Bates v. Day*, 196 Pa. 518, 48 Atl. 407, 82 Am. St. Rep. 811; *Miller v. Smith*, 26 R. I. 146, 58 Atl. 634, 68 L. R. A. 473, 106 Am. St. Rep. 699; *Clark v. Knowles*, 187 Mass. 35, 72 N. E. 352, 105 Am. St. Rep. 376; *Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030.

²⁴³ *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207; *Ball v. Anderson*, 196 Pa. 86, 48 Atl. 366, 79 Am. St. Rep. 693; *Farr v. Briggs' Estate*, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930; *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111. And see *Nashua Sav. Bank v. Anglo-American Land Mortgage & Agency Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782. A state court is not concluded as to the proper construction of the statutes of another state and the decision of its courts construing them, on the theory that defendant, by demurring to the complaint, which contained an allegation in the form of an averment of fact as to the meaning of such laws and decisions set forth therein, admitted that such was the correct conclusion to be drawn from them. *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839. See, also, *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 77 N. E. 877.

²⁴⁴ *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Sargent v. Stetson*, 181 Mass. 371, 63 N. E. 929; *Fidelity Insurance, Trust & Safe Deposit Co. v. Mechanics' Sav. Bank*, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228. But see *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89, where it was held that in an action at law in a federal court to enforce the constitutional and statutory liability of a stockholder in a Kansas corporation to its creditors, the defendant cannot set off an indebtedness from the corporation to him; such defense being only cognizable in equity, and the distinction between legal and equitable causes of action and defenses being carefully preserved in courts of the United States.

²⁴⁵ *Parmelee v. Price*, 206 Ill. 544, 70 N. E. 725.

corporation. As a general rule, therefore, to maintain such a suit he must show a judgment against the corporation, and a return of execution thereon unsatisfied.²⁴⁶ Such a return is sufficient proof that he has exhausted his legal remedy against the corporation.²⁴⁷

It is expressly provided in most statutes that the personal statutory liability of stockholders for debts of the corporation shall arise only after a recovery by the creditor of a judgment against the corporation, and an exhaustion of his legal remedy by execution, and a return of no property found, unless the corporation has been dissolved, or put in process of winding up, so that no judgment can be obtained against it. Under such a statute, unless the case comes within the exception, recovery of judgment against the corporation, and a return of execution unsatisfied, is a condition precedent to any liability on the part of the stockholders.²⁴⁸

Some courts hold that, where there is no such provision, the remedy inures to all creditors, whether they have recovered judgments against the corporation or not, and that, upon default of the corporation, any creditor may sue any stockholder.²⁴⁹ Other courts hold that, even in the absence of such a provision, the creditor must exhaust his remedy against the corporation before proceeding against stockholders, by recovery of judgment and issue of execution, for the liability of the stockholders is not to be regarded as a primary resource of the creditors.²⁵⁰

²⁴⁶ *National Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; *Remington v. Bay Co.*, 140 Mass. 494, 5 N. E. 292; *Sturges v. Vanderbilt*, 73 N. Y. 384.

²⁴⁷ *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776, 29 Am. St. Rep. 158; *Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763. It has been held that he should, if possible, obtain a judgment against the corporation in the jurisdiction in which he proposes to sue in equity, and issue execution thereon. This is the rule in the federal courts. Therefore, in *National Tube Works Co. v. Ballou*, supra, it was held that a creditors' bill, founded on a judgment recovered in Connecticut against a corporation of that state, could not be maintained in a United States circuit court in New York, against a citizen of that state, to enforce his liability on an unpaid subscription to the stock of the corporation, where no judgment had been obtained or execution issued against the corporation within the latter state, and no allegations were made showing that it was impossible to obtain such a judgment.

²⁴⁸ *Morley v. Thayer* (C. C.) 3 Fed. 737; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338. And see *Cambridge Waterworks v. Somerville Dyeing & Bleaching Co.*, 4 Allen (Mass.) 239; *Train v. Marshall Paper Co.*, 180 Mass. 513, 62 N. E. 967; *W. E. A. Legg & Co. v. Dewing*, 27 R. I. 126, 60 Atl. 1066.

²⁴⁹ *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. 120; *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

²⁵⁰ *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Wright v. McCormack*, 17 Ohio St. 86. And see *Rocky Mountain Nat. Bank*

It has been held, however, that where the corporation has become insolvent and made an assignment for the benefit of its creditors, or has been adjudicated a bankrupt, etc., the right of the creditors then accrues to commence suit against the stockholders, without any prior proceedings against the company.²⁵¹

SAME-EFFECT OF JUDGMENT AGAINST CORPORATION.

238. There is a difference of opinion as to the effect of a judgment against the corporation as evidence of its indebtedness as against a stockholder. The decisions are thus:

- (a) Where it is sought to enforce a statutory liability, it is *prima facie* evidence of indebtedness, except where the liability is penal.
- (b) Some courts hold it conclusive, in the absence of fraud or want of jurisdiction.
- (c) Where it is sought to enforce the common-law liability on account of stock, it is conclusive, in the absence of fraud or want of jurisdiction.

In some jurisdictions it is held that a judgment recovered against a corporation is *prima facie*, but not conclusive, evidence of indebtedness against the company, in an action against a stockholder to enforce his individual statutory liability.²⁵² But by its great weight of authority the judgment against the corporation is held to be conclusive evidence of the debt in the absence of fraud or want of jurisdiction.²⁵³ It is not

v. Bliss, 89 N. Y. 338; *Bronson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234.

²⁵¹ *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Shellington v. Howland*, 53 N. Y. 371; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 968; *Bronson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234; *United Glass Co. v. Vary*, 152 N. Y. 121, 46 N. E. 312. And see *Train v. Marshall Paper Co.*, 180 Mass. 513, 62 N. E. 967. Contra, *Morley v. Thayer* (C. C.) 3 Fed. 737.

²⁵² *Belmont v. Coleman*, 21 N. Y. 96; *Moss v. McCullough*, 5 Hill (N. Y.) 131; *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *Hastings v. Drew*, 76 N. Y. 9; *Stephens v. Fox*, 83 N. Y. 313.

²⁵³ *Slee v. Bloom*, 20 Johns. (N. Y.) 669; *Miller v. White*, 59 Barb. (N. Y.) 434 (reversed in 50 N. Y. 137); *Farnum v. Ballard Vale Machine Shop*, 12 Cush. (Mass.) 507; *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; *Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; *Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725; *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; *Town of Hinckley v. Kettle River R. Co.*, 80 Minn. 32, 82 N. W. 1088. Cf. *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. See 15 Fed. 360, note. So under the Massachusetts statute by which a summons in the action against the corporation was required to be served on stockholders, and they were permitted to de-

even prima facie evidence where the liability which it is sought to impose upon the stockholder is original and penal in its character.²⁵⁴

A judgment regularly obtained against a corporation is conclusive against a stockholder, in the absence of fraud, where the suit against him is to compel payment of his subscription to the stock of the corporation, or to compel him to refund property of the corporation unlawfully received by him.²⁵⁵ In such a case, however, it may be attacked for collusion and fraud.²⁵⁶

SAME—STATUTE OF LIMITATIONS.

239. The statute of limitations runs against an action by creditors to enforce against stockholders liability on account of their stock from the time an action can be maintained, which is generally when a valid call is made by the corporation or by a court of equity in a suit by creditors.

The statute runs against an action to enforce the statutory liability of stockholders from the time when a cause of action accrues, which is generally from the return of execution against the corporation. The rule will vary, however, according to the terms of the statute.

Liability on Subscription.

Some of the courts have held that the liability of stockholders to pay their subscriptions is a direct trust, and that the statute of limitations, therefore, does not run against it, at least until a call is made by the corporation or other proper authority. "If the corporation," it has been said, "does not compel payment of the stock, the subscribers must be deemed to hold it for the corporation, subject to its call. It is a continuing, subsisting trust and confidence, to which the statute of limitations has no application."²⁵⁷ The true relation, however, between a stockholder and the corporation, with respect to his unpaid subscription, is that of debtor and creditor. There is really no trust at all, either as to the corporation or its creditors.²⁵⁸ There is simply a debt, a contract;

and in such action, etc. *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. (Mass.) 576.

²⁵⁴ *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 N. Y. 155. See explanation of these cases in *Hastings v. Drew*, 76 N. Y. 9, and *Stephens v. Fox*, 83 N. Y. 313.

²⁵⁵ *Barron v. Paine*, 83 Me. 312, 22 Atl. 218; *Bissit v. Navigation Co. (C. C.)* 15 Fed. 353; *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97.

²⁵⁶ *Bissit v. Navigation Co. (C. C.)* 15 Fed. 353; *Saylor v. Commonwealth Inv. & B. Co.*, 38 Or. 204, 62 Pac. 652.

²⁵⁷ *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74. And see *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Mack's Appeal (Pa.)* 7 Atl. 481.

²⁵⁸ Ante, p. 526 et seq.

and, in reason, the statute of limitations begins to run when a cause of action thereon accrues.²⁸⁹ If the subscription is payable on demand, or on call, the statute begins to run when a call is duly made, and not before then.²⁹⁰ If a corporation becomes insolvent and suspends business, no call by the corporation is necessary to render stockholders liable, but there must be some authorized demand or call by a receiver, assignee, or decree of the court, and the statute does not begin to run until then.²⁹¹ Where, by statute, a creditor who has recovered a judgment against the corporation, and had execution returned unsatisfied, is allowed to have execution against a stockholder, the cause of action accrues against stockholders when an execution on a judgment against the corporation has been returned unsatisfied, and the statute runs from that time.²⁹² Some courts have held that the statute runs against an action against a stockholder to subject the balance due by him on his shares to the satisfaction of a judgment obtained against the corporation, from the time when the cause of action accrued against the corporation.²⁹³

Statutory Liability.

Sometimes the statute creating the liability of stockholders specifies the time within which an action must be brought by creditors to en-

²⁸⁹ See *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 691, 908; *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641; *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725.

²⁹⁰ *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214; *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288; *Otter View Land Co.'s Receiver v. Bowling's Ex'x*, 70 S. W. 834, 24 Ky. Law Rep. 1157; *New England F. Ins. Co. v. Haynes*, 71 Vt. 308, 45 Atl. 221, 76 Am. St. Rep. 771; *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920; *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861; *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641; *Union Sav. Bank v. Lelter*, 145 Cal. 596, 79 Pac. 441. Cf. *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 South. 611. And see cases in the following note.

²⁹¹ *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 South. 44; *Glenn v. Williams*, 60 Md. 98; *Hawkins v. Glenn*, 181 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; *Great Western Tel. Co. v. Gray*, *supra*; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Glenn v. Howard*, 81 Ga. 383, 8 S. E. 636, 12 Am. St. Rep. 318. In Pennsylvania it is held that where a corporation becomes insolvent, and makes an assignment, the statute begins to run from the date of the assignment. *Franklin Sav. Bank v. Bridges* (Pa. Sup.) 8 Atl. 611.

²⁹² *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405. See, also, *West v. Topeka Sav. Bank*, 66 Kan. 524, 72 Pac. 252, 63 L. R. A. 137, 97 Am. St. Rep. 385.

²⁹³ *First Nat. Bank v. Greene*, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754. See, also, *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189.

force the same. Where this is not the case the limitation depends upon the nature of the liability. If it is contractual, the clause of the statute relating to actions on contract is generally held to govern.²⁶⁴ If the liability is penal, the case is governed by the clause relating to actions upon a statute for a penalty or forfeiture.²⁶⁵

The statute of limitations begins to run as soon as creditors acquire a right to sue the stockholders. Where the statute requires recovery of judgment against the corporation, and issue of execution, and return of no property found, it does not begin to run until then; that is, until the return of the execution.²⁶⁶ If a right of action accrues on the insolvency or dissolution of the corporation, or an assignment for creditors, and no judgment against the corporation is necessary, the statute runs from that time.²⁶⁷ If the statute makes the stockholders liable as principal debtors, the liability accrues against the corporation and the stockholders at the same time, and suspension of the remedy against the corporation, as by a renewal of the debt, does not suspend the remedy against, or affect the liability of, the stockholders.²⁶⁸ A suit commenced by one creditor on behalf of himself and all others—that is, a general creditors' bill—is in the nature of a demand for all, and stops the running of the statute as against all creditors who may come in and assert their claims.²⁶⁹

²⁶⁴ The clause applicable to an action upon a liability created by statute, other than a penalty or forfeiture, governs. *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 77 Pac. 939.

²⁶⁵ *Wiles v. Suydam*, 64 N. Y. 173; *Merchants' Bank of New Haven v. Bliss*, 35 N. Y. 412; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; post, p. 599.

²⁶⁶ *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368; *Handy v. Draper*, 89 N. Y. 334; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234; *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039.

²⁶⁷ *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. 120; *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Bronson v. Schnelder*, 49 Ohio St. 438, 33 N. E. 233; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234; *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *First Nat. Bank v. King*, 60 Kan. 733, 57 Pac. 952; *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 64 Pac. 984, 88 Am. St. Rep. 229; *Seattle Nat. Bank v. Pratt (C. C.)* 103 Fed. 62. Where the law creating the liability is silent as to the time when the right of action accrues, it accrues immediately on the insolvency or like default. *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

²⁶⁸ *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; *Parrott v. Colby*, 6 Hun (N. Y.) 57; *Id.*, 71 N. Y. 597; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Goodall v. Jack*, 127 Cal. 258, 59 Pac. 575; *Brigham v. Nathan*, 62 Kan. 243, 62 Pac. 319.

²⁶⁹ *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. Cf. *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

Enforcement in Foreign Jurisdiction.

Ordinary statutes of limitation are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But if a statute which creates a right of action also limits it, as is commonly the case with statutes imposing upon stockholders liability to creditors, the right will be enforced, subject to the limitation, even in a foreign state or jurisdiction.²⁷⁰ On the other hand, a state has the right to enact a statute of limitations applicable to actions to enforce the liability of stockholders in foreign as well as in domestic corporations, and such a statute of limitations will be enforced in action against a stockholder in a foreign corporation, both by the courts of the state and by the federal courts sitting in the state, in cases brought therein.²⁷¹

As we have seen, the statutory liability of stockholders is generally regarded as contractual,²⁷² so that the right of action is barred by the statute limiting the right of recovery on contracts.²⁷³ It has been recently held by the supreme court of the United States, however, that the liability of stockholders in a national bank to creditors is not to be regarded as contractual, so as to make applicable the limitation prescribed by a statute of Washington for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."²⁷⁴

²⁷⁰ *Brunswick Terminal Co. v. National Bank*, 99 Fed. 635, 40 O. C. A. 22, 48 L. R. A. 625; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Davis v. Mills*, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067.

²⁷¹ *Platt v. Wilmot*, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809; *Dexter v. Edmonds (C. C.)* 89 Fed. 467; *Hutchings v. Lamson*, 96 Fed. 720, 37 O. C. A. 564; *Hobbs v. National Bank*, 96 Fed. 396, 37 O. C. A. 513.

²⁷² *Ante*, p. 581.

²⁷³ *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738.

²⁷⁴ *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702. The court distinguishes the case from *Carrol v. Green*, *supra*, on the ground that in that case the right to recover was direct and immediate, while in the case at bar, in consequence of the provisions of the national banking act, which makes the right to sue dependent upon an assessment by the comptroller, the right to recover was secondary and contingent. It is difficult to reconcile the decision with the earlier cases holding the liability contractual. See dissenting opinion of White, J. Cf. *Platt v. Wilmot*, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809.

SAME-SET-OFF BY STOCKHOLDERS.

240. A stockholder who is also a creditor of the corporation cannot set off his claim, either against his liability on his subscription, or his liability for corporate funds unlawfully received by him, or against his statutory liability, if it is only sought to make him contribute a proportionate sum for the payment of all creditors pro rata. But under some statutes he can do so where an action is brought by a single creditor for his sole benefit.

Where a stockholder of an insolvent corporation, who is also a creditor, is indebted to the corporation on his subscription, or for property of the corporation unlawfully paid to him, as by way of unauthorized dividends, or on any other cause, the proper thing for him to do is to pay what he owes, and then come in and share ratably with the other creditors in all the assets of the corporation. He cannot, when sued upon his indebtedness by or for the benefit of all the creditors, set off the debt due him from the corporation, for to allow this would be to permit him to appropriate this asset of the company to payment of his own claim to the exclusion of the other creditors.²⁷⁵ The same rule applies where suit is brought against stockholders to enforce their statutory liability. If it is sought to compel them each to contribute a proportionate sum to a fund for the payment of all creditors pro rata, a set-off cannot be allowed.²⁷⁶ Where, however, an action is brought

²⁷⁵ *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, 1 Cumming, Cas. Priv. Corp. 855; *Osgood v. Ogden*, *48 N. Y. 70; *Lawrence v. Nelson*, 21 N. Y. 158; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, 43 N. W. 290, 5 L. R. A. 649; *Hillier v. Insurance Co.*, 3 Pa. 470, 45 Am. Dec. 656; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Thebus v. Smiley*, 110 Ill. 316; *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797; *Bausman v. Kinnear*, 79 Fed. 172, 24 C. C. A. 473; *Richardson v. Merritt*, 74 Minn. 354, 77 N. W. 234, 407, 968; *Colorado Fuel & Iron Co. v. Sedalia Smelting Co.*, 13 Colo. App. 474, 59 Pac. 222; *Eldred v. Piedmont Land-Imp. & Inv. Co.*, 55 S. C. 78, 32 S. E. 758, 897; *Wilkinson v. Bertock*, 111 Ga. 187, 36 S. E. 623. Contra, by statute, *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592. In *Lawrence v. Nelson*, supra, the defendants, members of a mutual marine insurance company, sustained a loss upon an insured vessel, which loss was adjusted before commencement of proceedings to dissolve the company as insolvent. In an action brought by the receiver of the company to recover on the premium notes given by the defendants for the policies issued to them, it was held that they could not set off the company's indebtedness for the loss. *Hillier v. Insurance Co.*, supra, was to the same effect. In most of the other cases cited above, the action was for unpaid subscriptions, or to recover dividends unlawfully paid.

²⁷⁶ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Ball Electric L. Co. v. Child*, 68 Conn. 522, 37 Atl. 391; *Parker v. Carolina Sav. Bank*, 53

by a single creditor, as may be done under some statutes, to enforce a several and original liability, for the sole benefit of the creditor suing, it is held, anomalously, by the weight of authority, that upon equitable grounds the stockholder may set off a debt owing to him from the corporation.²⁷⁷

SAME-CONTRIBUTION AMONG STOCKHOLDERS.

241. A stockholder is entitled to contribution from the other stockholders where he has paid more than his share of corporate debts, either

- (a) On account of a liability on his subscription, the other stockholders being also liable on their subscriptions,**
- (b) Or on account of his statutory liability, where it is contractual, all the stockholders being jointly and severally liable.**
- (c) But not where the payment was on account of a penal statutory liability.**

If the liability imposed by the statute for the debts of the company is penal, and not contractual, stockholders against whom creditors have enforced the liability cannot maintain a suit against other stockholders

S. O. 583, 81 S. E. 673, 69 Am. St. Rep. 888; *Barnes v. Arnold*, 45 App. Div. 314, 61 N. Y. Supp. 85, affirmed 169 N. Y. 611, 62 N. E. 1093; *Robinson v. Brown* (C. C.) 126 Fed. 430. Cf. *U. S. Trust Co. v. U. S. Fire Ins. Co.* (In re Empire City Bank), 18 N. Y. 199.

²⁷⁷ *U. S. Trust Co. v. U. S. Fire Ins. Co.* (In re Empire City Bank), 18 N. Y. 199, 227; *Garrison v. Howe*, 17 N. Y. 458; *Mathez v. Neldig*, 72 N. Y. 100; *Agate v. Sands*, 73 N. Y. 620; *Wheeler v. Millar*, 90 N. Y. 353; *Pierce v. Topeka C. S. Co.*, 60 Kan. 164, 55 Pac. 853; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank*, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228; *Ball v. Anderson*, 196 Pa. 86, 46 Atl. 366, 79 Am. St. Rep. 693; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Cahill v. Association*, 94 Md. 358, 50 Atl. 1044, 89 Am. St. Rep. 434; *Strauss v. Denny*, 95 Md. 690, 53 Atl. 571. Contra, *Lauraglen Mills v. Ruff*, 57 S. C. 53, 35 S. E. 387, 49 L. R. A. 448; ante, p. 581. To entitle him to a set-off, he must be really a creditor of the corporation. He cannot set off a debt due him from the corporation if he owes the company, on his subscription, more than the amount of his claim against it. *Wheeler v. Millar*, supra. But where a stockholder had purchased judgments against the corporation, while he was a director, and after he knew the company was insolvent, it was held that the judgments could avail him as a defense or set-off only to the amount actually paid for them. *Bulkley v. Whitcomb*, 121 N. Y. 107, 24 N. E. 13. And see *Abbey v. Long*, 44 Kan. 688, 24 Pac. 1111, where it was held that a stockholder, though not a director, cannot buy up claims against the corporation, and then set them off against his liability at their face value. And see *Thompson v. Melsser*, 108 Ill. 359; *Manville v. Karst* (C. C.) 16 Fed. 175; *Kunkelman v. Rentchler*, 15 Ill. App. 271; *Gauch v. Harrison*, 12 Ill. App. 459; *Smith v. Mosby*, 9 Heisk. (Tenn.) 501; *Balch v. Wilson*, 25 Minn. 299, 33 Am. Rep. 467. In *Manville v. Karst* (C. C.) 16 Fed. 173, the defendant, a stockholder in an insolvent bank, became liable to creditors of the bank in the sum of \$1,200, under a double liability

for contribution.²⁷⁸ It is otherwise, however, if the statute imposes a contractual liability upon the stockholders jointly and severally, and one of them is compelled to pay more than his share. In such a case he may file a bill in equity to enforce contribution from the other stockholders who were also liable;²⁷⁹ or, if he is made defendant with other stockholders in a suit for the benefit of the creditors generally, his right to contribution may be enforced in that suit.²⁸⁰ So, where stockholders are liable on their subscriptions, and one of them is compelled to pay the amount due from him to satisfy a corporate debt, he may sue for contribution.²⁸¹ Ordinarily contribution may be enforced by a suit in equity, but, if the statute prescribes a remedy, it must be followed.²⁸² A suit for contribution may be maintained against nonresident stockholders.²⁸³ Liability to contribute survives the death of a stockholder.²⁸⁴

RELATION BETWEEN CREDITORS AND OFFICERS.

242. There is no privity between the creditors of a corporation and its officers. And, strictly speaking, there is no trust relation.

243. The creditors of a corporation cannot maintain an action at law against its officers for fraud, negligence, or other breach of duty to the corporation. But if the officers are liable to the corporation for fraud, negligence or other wrongs, the liability constitutes an equitable asset of the corporation, and may be reached by its judgment creditors in equity.

The creditors of an insolvent corporation, according to all of the authorities, may, in order to procure satisfaction of their claims, enforce

law, and was sued for that amount by a creditor. Before judgment could be had, he agreed with a friend that, if the latter would buy up claims against the bank to the amount of his liability, he would confess judgment in his favor, and the friend bought up claims at a large discount, from a stockholder in the bank, and the defendant confessed judgment in his favor for the full amount of the claims, and paid the same. It was held that the judgment and satisfaction could not avail him as a defense.

²⁷⁸ Sayles v. Brown (C. C.) 40 Fed. 8.

²⁷⁹ 1 Cook, Stock, Stockh. & Corp. Law, § 211; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40; Wincock v. Turpin, 96 Ill. 135; Allen v. Fairbanks (C. C.) 40 Fed. 188; Id. (C. C.) 45 Fed. 445; Koons v. Martin, 66 Hun, 554, 21 N. Y. Supp. 657; Bennison v. McConnell, 56 Neb. 46, 76 N. W. 412. And see Wolters v. Henningsan, 114 Cal. 433, 46 Pac. 277.

²⁸⁰ Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

²⁸¹ Wincock v. Turpin, 96 Ill. 135; 1 Cook, Stock, Stockh. & Corp. Law, § 227.

²⁸² O'Reilly v. Bard, 105 Pa. 569.

²⁸³ Allen v. Fairbanks (C. C.) 45 Fed. 445.

²⁸⁴ Allen v. Fairbanks (C. C.) 40 Fed. 188.

the liability of directors and other officers of the corporation for losses resulting from their mismanagement of the corporate affairs. Most of the courts have based the right of action in such cases upon the ground that the assets of a corporation are a trust fund for the benefit of creditors, and that the officers are trustees for their benefit.²⁸⁶ The trust-fund doctrine, however, has been virtually exploded, as we have seen, by late decisions of courts of the highest authority, and it is perhaps safe to say that no court would now hold directly that any trust relation exists between the officers and the creditors of a corporation.²⁸⁷ The true basis of the right of creditors to proceed against the officers of a corporation is in their right to reach equitable assets of the corporation and apply them to the satisfaction of their claims. The officers of a corporation, as we have seen, are liable to the corporation for losses caused by their fraud, gross negligence, or willful breach of duty, and this liability may be enforced by or for the benefit of creditors when the corporation becomes insolvent. It is the enforcement of their claims by creditors against equitable assets of the corporation.²⁸⁷

Whatever may be the grounds upon which the right of action is based by the different courts, it is well settled that where the officers of a corporation willfully misappropriate or misapply its assets, and the corporation becomes insolvent, the creditors in equity may hold them liable to the extent of the misappropriation.²⁸⁸ So if the officers of an insolvent corporation have been grossly negligent in the performance of their duties, and the assets of the company have been thus allowed to be wasted, they may be held liable to creditors to the extent of the loss.²⁸⁹ Thus, if the assets of a bank are wasted through the mis-

²⁸⁶ 1 Mor. Priv. Corp. § 568.

²⁸⁷ Ante, p. 526 et seq.

²⁸⁸ See 2 Mor. Priv. Corp. §§ 795, 796. Mere creditors of a corporation have no interest in a proceeding charging its directors with wasting assets until their claims are established either at law or in equity, and other assets of the company for the satisfaction of claims have been exhausted. *Edwards v. National Window Glass J. Ass'n* (N. J. Ch.) 58 Atl. 527.

²⁸⁹ *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 195; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 531; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Moses v. Bank*, 1 Lea (Tenn.) 398; *Bank of St. Mary's v. St. John*, 25 Ala. 566; *In re Brockway Mfg. Co.*, 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401; *Michelson v. Pierce*, 107 Wis. 85, 82 N. W. 707; *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084; *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120; ante, p. 502 et seq.

²⁹⁰ *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; *Delano v. Case*, 17 Ill. App. 531; *Id.*, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609, 15 Am. Rep. 731; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 195; *Gores v. Day*, 99 Wis. 276, 74 N. W. 787; *Foster v. Bank of Abingdon* (C. C.) 88 Fed. 604; *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 50 Atl. 887; *Killen v. State*

management or gross negligence of the directors, the depositors may hold them liable.²⁹⁰

It is well settled, however, that the officers of a corporation, if they act in good faith within the limits of the powers conferred upon the corporation by its charter, and within their authority, and use a proper degree of prudence and diligence, are not responsible either to the corporation or to its creditors for losses resulting from mere mistakes or errors of judgment.²⁹¹ Thus, they are not liable for declaring or paying a dividend which diminishes the capital, in violation of a statute or the common law, where they are not guilty of bad faith or negligence.²⁹² Nor are they liable for losses from accident, theft, etc., where they have not been negligent.²⁹³ The directors of a corporation cannot be held liable to creditors of the corporation for the acts or omissions of other agents, unless they have been guilty of neglect in supervising or appointing them.²⁹⁴ What constitutes such negligence as will render officers of a corporation liable has been considered on a former page.²⁹⁵

A creditor of a corporation cannot sue its officers at law for fraud, negligence, or mismanagement in conducting the affairs of the corporation.²⁹⁶ The remedy is in equity, by creditors' bill.²⁹⁷ All the guilty officers need not be joined as parties, for their liability is several, but the corporation must be made a party.²⁹⁸

Bank, 106 Wis. 546, 82 N. W. 536; Rice v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153. Contra, Deaderick v. Bank of Commerce, 100 Tenn. 457, 45 S. W. 786; Union Nat. Bank v. Hill, 148 Mo. 880, 49 S. W. 1012, 71 Am. St. Rep. 615; Stone v. Rottman, 183 Mo. 552, 82 S. W. 76; Wilson v. Stevens, 129 Ala. 630, 29 South. 678, 87 Am. St. Rep. 86. Ante, p. 503.

²⁹⁰ See cases cited in the preceding note.

²⁹¹ Spring's Appeal, 71 Pa. 11, 10 Am. Rep. 684, 1 Cumming, Cas. Priv. Corp. 799; Watt's Appeal, 78 Pa. 370; Williams v. McDonald, 37 N. J. Eq. 409; ante, p. 505.

²⁹² Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Van Dyck v. McQuade, 86 N. Y. 38; Lexington & O. R. Co. v. Bridges, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; ante, p. 502.

²⁹³ Mowbray v. Antrim, 123 Ind. 24, 23 N. E. 858.

²⁹⁴ Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, 2 Cumming, Cas. Priv. Corp. 186, Shep. Cas. Corp. 200. And see Savings Bank of Louisville's Assignee v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488.

²⁹⁵ Ante, p. 502.

²⁹⁶ Zinn v. Mendel, 9 W. Va. 580; Smith v. Poor, 40 Me. 415, 63 Am. Dec. 672; Branch v. Roberts, 50 Barb. (N. Y.) 435; Fusz v. Spaunhorst, 67 Mo. 256. But see Solomon v. Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

²⁹⁷ Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121.

²⁹⁸ Cunningham v. Pell, 5 Paige (N. Y.) 607.

SAME—PREFERENCES TO OFFICERS WHO ARE CREDITORS.

244. When a corporation becomes insolvent and ceases to do business, it is very generally held that the directors or other officers in charge of its assets cannot, by mortgage or otherwise, secure to themselves any preference or advantage over other creditors; but in many jurisdictions such preferences are sustained.

So long as a corporation is doing business, there is no privity whatever between the directors or other officers and its creditors. It has often been said that, when a corporation becomes insolvent and ceases to do business, a quasi trust relation arises between the officers and its creditors; that they hold the property of the corporation as a trust fund for the equal benefit of all the creditors; and that, if they are themselves creditors while the corporation is under their management, they cannot, by mortgage or otherwise, secure to themselves any preference or advantage over other creditors.²⁹⁹ It is undoubtedly the law in many jurisdictions in this country that officers of a corporation cannot prefer themselves over other creditors, under such circumstances, but it is not true that there is any real trust relation between them and the creditors; and to say that there is, and base the invalidity of the transaction on that ground, will tend to confuse. As a matter of fact, such a transaction is invalid as against the other creditors, because it is fraudulent as to them, and it is not necessary to look for any other reason.³⁰⁰

²⁹⁹ *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Olney v. Land Co.*, 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. Rep. 767; *Haywood v. Lumber Co.*, 64 Wis. 639, 26 N. W. 184; and cases hereafter cited.

³⁰⁰ That such preferences are void as against creditors, whatever may be the ground of invalidity. See *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Slcardi v. Oil Co.*, 149 Pa. 148, 24 Atl. 163; *Adams v. Milling Co. (C. C.)* 35 Fed. 483; *Hays v. Bank*, 51 Kan. 535, 33 Pac. 818; *Ingwersen v. Edgecombe*, 42 Neb. 740, 60 N. W. 1032; *Love Mfg. Co. v. Queen City Mfg. Co.*, 74 Miss. 290, 20 South. 146; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841; *James Clark Co. v. Colton*, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698; *National Wall Paper Co. v. Columbia Nat. Bank*, 63 Neb. 234, 88 N. W. 481, 56 L. R. A. 121; *Symonds v. Lewis*, 94 Me. 501, 48 Atl. 121; *Taylor v. Fanning*, 87 Minn. 52, 91 N. W. 269; *Pangburn v. American Vault, Safe & Lock Co.*, 205 Pa. 83, 54 Atl. 504; *Portland Consol. Min. Co. v. Rossiter*, 16 S. D. 633, 94 N. W. 702, 102 Am. St. Rep. 726. Cf. *Hill v. Standard Telephone Co.*, 209 Pa. 231, 58 Atl. 147. Thus, where a majority of the directors of a corporation, knowing it to be insolvent, vote for the execution to them of the corporation's judgment note, which is executed by one of their number as treasurer, and a judgment is immediately entered, the judgment is fraudulent and void as to other creditors, though the note was given in payment of a bona fide debt. *Roseboom v. Whittaker*, *supra*. This rule has been extended to include preferences given by officers to their relatives. Ad-

The authorities, however, are by no means uniform on the question, and in many jurisdictions such preferences are sustained.⁸⁰¹ In England it has been expressly held that the directors of an insolvent corporation are not trustees for creditors; and it has further been held that in paying corporate debts, before proceedings to wind up the company have been instituted, they may prefer debts upon which they are themselves liable as guarantors.⁸⁰²

SAME—STATUTORY LIABILITY OF OFFICERS.

245. In most states it is provided by statute that the directors or other officers of a corporation shall be liable for its debts, where they are guilty of certain official neglect or misconduct. These statutes, being penal, are strictly construed.

In most of the states, statutes have been enacted making the directors or other officers of a corporation liable for its debts where they are guilty of certain official neglect or misconduct, as of failure to make and file a report of the condition of the corporation required by law; ⁸⁰³ making false reports; ⁸⁰⁴ allowing the debts of the corporation

ams v. Milling Co., supra. And it has been applied to conveyances by officers in payment of a debt on which they were liable as guarantors or sureties. Richards v. Insurance Co., 43 N. H. 263.

⁸⁰¹ Corey v. Wadsworth, 118 Ala. 488, 25 South. 503, 44 L. R. A. 766; Anderson v. Bullock Co. Bank, 122 Ala. 275, 25 South. 523; National Bank of the Republic v. George M. Scott & Co., 18 Utah, 400, 55 Pac. 374; American Exch. Nat. Bank v. Ward, 111 Fed. 782, 49 C. C. A. 611, 55 L. R. A. 356; Nappanee Canning Co. v. Reid, 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199; Wilson v. Stevens, 129 Ala. 630, 29 South. 678, 87 Am. St. Rep. 86; Heldbreder v. Superior Ice & Cold Storage Co., 184 Mo. 446, 83 S. W. 466; Pitman v. Chicago-Joplin Lead & Zinc Co., 113 Mo. App. 513, 87 S. W. 10. Cf. Shields v. Hobart, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 529. An insolvent manufacturing corporation may lawfully prefer a claim due to a director though his vote is required to pass the resolution authorizing the preference. City Nat. Bank v. Goshen Woolen Mills Co., 163 Ind. 214, 71 N. E. 652, reversing 35 Ind. App. 562, 69 N. E. 206.

⁸⁰² Poole, Jackson & Whyte's Case (In re Wincham Ship-Building, Boiler & Salt Co.), 9 Ch. Div. 322. And see Atlas Tack Co. v. Hardware Co., 101 Ga. 391, 29 S. E. 27; Rockford Wholesale Grocery Co. v. Standard Grocery & Meat Co., 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205.

⁸⁰³ Bruce v. Platt, 80 N. Y. 379; Halsey v. McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Gans v. Switzer, 9 Mont. 408, 24 Pac. 18; Bank of Saginaw v. Pierson, 112 Mich. 410, 70 N. W. 901; Staten Island M. R. Co. v. Hinchliffe,

⁸⁰⁴ As to the liability under such a provision, see Pier v. Hanmore, 86 N. Y. 95; Matthews v. Patterson, 16 Colo. 215, 26 Pac. 812; Clow v. Brown, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; Flanders v. Roberts, 182 Mass. 530, 65 N. E. 902.

to exceed the capital or a certain proportion of the capital;³⁰⁵ paying a dividend which diminishes the amount of the capital stock;³⁰⁶ failure to publish or file the articles of association;³⁰⁷ violating any of the provisions of the act under which the corporation is formed, whereby it shall become insolvent, etc.³⁰⁸ Most of these statutes are highly penal, and are to be strictly construed. The liability cannot be extended beyond the strict terms of the statute, and a clear case must be established to render an officer liable.³⁰⁹

One of the directors or trustees, who is also a creditor of the corporation, cannot maintain an action under the statutes against his co-trustees or co-directors for breach of duty, and his assignee stands in the same position. To allow such an action would enable him to profit by his own wrong or negligence.³¹⁰ But the liability may be enforced by a creditor who is a stockholder.³¹¹

Where an action is brought against a director under a statute making directors liable for the debts of the company if they fail to file a re-

170 N. Y. 473, 63 N. E. 545; *Ginsburg v. Von Seggern*, 59 App. Div. 595, 69 N. Y. Supp. 758, affirmed 172 N. Y. 662, 85 N. E. 1116; *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596; *Beekman Lumber Co. v. Ahern*, 75 Ark. 107, 86 S. W. 848. That the New York statute does not require a report after the corporation has ceased to own property or do business, and has been practically dissolved, see *Bruce v. Platt*, 80 N. Y. 379, and cases there cited. See, also, *Kirkland v. Kille*, 99 N. Y. 395, 2 N. E. 36. But the mere fact that the company has ceased to do business, and is winding up its affairs, is no excuse for failure to file a report. *Sanborn v. Lefferts*, 58 N. Y. 179. And see *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18. As to sufficiency of report, see *Bonnell v. Griswold*, 80 N. Y. 128; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Whitaker v. Masterton*, 106 N. Y. 277, 12 N. E. 604. Under a statute making directors liable for failure to file a report, the liability does not attach if a report is filed, though it may be false. *Bonnell v. Griswold*, 80 N. Y. 128; *Pier v. Hanmore*, 86 N. Y. 95; *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812.

³⁰⁵ *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692; *Thacher v. King*, 156 Mass. 490, 31 N. E. 648. An indebtedness of a corporation to one of its directors constitutes a debt due within the statute. *Id.*

³⁰⁶ See *Rorke v. Thomas*, 56 N. Y. 559; *Patterson v. Thompson* (C. C.) 86 Fed. 85.

³⁰⁷ See *Cady v. Sanford*, 53 Vt. 632.

³⁰⁸ *Patterson v. Manuf'g Co.*, 41 Minn. 84, 42 N. W. 926, 4 L. R. A. 745, 16 Am. St. Rep. 671; *Edwards v. Armour Packing Co.*, 190 Ill. 467, 60 N. E. 807.

³⁰⁹ *Garrison v. Howe*, 17 N. Y. 458; *Rorke v. Thomas*, 56 N. Y. 559; *Bruce v. Platt*, 80 N. Y. 381; *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *President, etc., of Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 53 N. E. 790; *International Paper Co. v. Gazette Co.*, 182 Mass. 578, 66 N. E. 636; *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

³¹⁰ *Knox v. Baldwin*, 80 N. Y. 610.

³¹¹ *Sanborn v. Lefferts*, 58 N. Y. 179.

port, the plaintiff must establish the fact that he is a creditor of the company; and, by the weight of authority, proof of the recovery of a judgment against the company is not conclusive, nor even prima facie evidence of the debt.⁸¹²

An action against a director by a creditor of the corporation under these statutes is within the statute of limitations relating to actions to recover a penalty. It is an action "upon a statute for a penalty or forfeiture."⁸¹³ The statute begins to run from the time the cause of action accrues in favor of the creditor, and not from the time of default on the part of the directors, as the failure to file a report.⁸¹⁴

It also follows, from the penal character of such statutes, that there is no vested right in a cause of action arising under them until it has been reduced to judgment, and not only may the statutes be repealed before action has been commenced, but they may be repealed at any time before judgment, and an action previously commenced cannot be further prosecuted.⁸¹⁵

Same—Enforcement in Foreign Jurisdiction.

Whether the statutory liability of a director can be enforced against him in a foreign state is generally held to depend upon whether the liability is to be regarded as contractual or as penal. If the purpose of the statute is to furnish a remedy to creditors who have been injured by the directors' violation of the requirements of the statute, their liability is contractual, and an action upon the statute is transitory and can be brought in any state. Statutes making the directors liable for debts contracted in excess of the capital or of a certain proportion of the cap-

⁸¹² *Miller v. White*, 50 N. Y. 137; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. See, also, *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577. Cf. *Cady v. Sanford*, 53 Vt. 632; *Allen v. Clark*, 108 N. Y. 269, 15 N. E. 387; *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557, 67 N. E. 870.

⁸¹³ *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Wiles v. Suydam*, 64 N. Y. 178; *Knox v. Baldwin*, 80 N. Y. 610; *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.*, 48 Minn. 849, 51 N. W. 117; *Patterson v. Thompson (C. C.)* 88 Fed. 85. Contra, *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301. And see *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976.

⁸¹⁴ *Jones v. Barlow*, 62 N. Y. 202; *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *Continental Nat. Bank v. Buford*, 114 Fed. 290, 53 C. C. A. 14. Where a trustee of a corporation has become liable for a debt of the company because of failure to file an annual report, the right of action is barred after lapse of the statutory period (in New York, three years), though the default is continued during successive years. *Losee v. Bullard*, 79 N. Y. 404.

⁸¹⁵ *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367; *Breitung v. Lindauer*, 37 Mich. 217; *Knox v. Baldwin*, 80 N. Y. 610; *Gregory v. Bank*, 8 Colo. 332, 25 Am. Rep. 760.

ital are of this character.⁸¹⁶ If, however, the liability is in the nature of a penalty imposed for the neglect of a duty, such as a failure to make and file a report, or for making a false report, it has very generally been held that the liability is penal in its nature, and cannot be enforced in a foreign state.⁸¹⁷ A different view, however, has been taken by the supreme court of the United States in a case in which it was held that the liability created by a New York statute, which made the officers of a corporation liable for its debts in case they made a false certificate or report that the stock was fully paid in, was not penal in an international sense, but might be enforced by a creditor in another state.⁸¹⁸

⁸¹⁶ *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146. See, also, *First Nat. Bank v. Price*, 33 Md. 487, 3 Am. Rep. 204.

⁸¹⁷ *Halsey v. McLean*, 12 Allen (Mass.) 438, 90 Am. Dec. 157; *Derrickson v. Smith*, 27 N. J. Law, 166; *Bird v. Hayden*, 2 Abb. Prac. N. S. (N. Y.) 61; *Price v. Wilson*, 67 Barb. (N. Y.) 9; *Neal v. Moultrie*, 12 Ga. 104; *Field v. Haines* (C. C.) 28 Fed. 919; *Farr v. Briggs*, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930. "Where a liability is declared for some act or neglect in no way connected with the contracting of the debt, as for neglecting to file reports, it is undoubtedly penal; but where, as here, the liability for the debt arises out of the assent to the contract creating the debt, it would seem to be that of a contracting debtor, and no case to the contrary has been noticed." Per *Wheeler, J.*, in *Field v. Haines*, *supra*.

⁸¹⁸ *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, reversing *Attrill v. Huntington*, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. Rep. 344. To the same effect, see *Huntington v. Attrill* (1893) A. C. 150; *First Nat. Bank v. Weidenbech*, 97 Fed. 896, 38 C. C. A. 131; *Davis v. Mills* (C. C.) 99 Fed. 39. And see *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976. In *Huntington v. Attrill*, in the United States supreme court, Mr. Justice Gray said: "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * * The provision of the statute of New York now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or quasi criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers, and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every

creditor of the company, who by reason of their wrongful acts has not the security for the payment of his debt out of the corporate property on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country."

CHAPTER XV.

FOREIGN CORPORATIONS.

- 246. Foreign Corporations Defined.
- 247-249. Status of a Foreign Corporation.
- 250-254. Actions by and against.
- 255. Visitorial Power over Foreign Corporations.

FOREIGN CORPORATIONS DEFINED.

246. A foreign corporation is a corporation created by or under the laws of another state or country.

Foreign corporations have been defined in a former chapter, in treating of the creation and citizenship of corporations.¹

STATUS OF A FOREIGN CORPORATION.

247. A corporation has the capacity to act and contract, by its agents, in a state or country other than that by which it was created, with the express or implied consent of that country or state.
248. And by rules of comity binding upon the courts of a state, foreign corporations have a right to do business therein, the consent of the state being presumed, except
- (a) Where it is prohibited by express statutory or constitutional enactment.
 - (b) Where to allow it to do so would be contrary to the public policy of the state.
249. A state, if it sees fit, may, by legislation exclude a foreign corporation altogether or it may subject to particular constitutional limitations prescribe any conditions it may deem fit as a prerequisite to its right to do business within its limits. It cannot impose conditions in violation of the federal constitution.

Power to Act in Another Jurisdiction.

In *Bank of Augusta v. Earle*,² it was contended that, notwithstanding the powers conferred by the terms of its charter, "a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extraterritorial operation, and that, as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits

¹ Ante, p. 66 et seq.

² 13 Pet. (U. S.) 519, 585, 10 L. Ed. 274.

in which that law operates; and that it must necessarily be incapable of making a contract in another place." The court, however, overruled this contention, and held that it could act out of the state, through its agents, with the consent of the foreign state. "It is very true," it was said, "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court. * * * Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?"

The question has been raised whether it is proper, as a matter of public policy, under any circumstances, for a state to recognize a corporation created by another state or a foreign government. The prosecution of a claim to property by an Alabama corporation in Louisiana was resisted in the latter state, in *Williamson v. Smoot*,³ on the ground that it was a violation of the sovereignty of a state, and prejudicial to the rights of its citizens, to recognize a corporation created by the legislature of another state. It was held, however, that though attempts directly opposed to the sovereign power of a state, or the rights of its citizens, made by a corporation deriving its existence from another state, ought to be repelled, yet where a corporation comes into the courts of a state other than that by which it was created, and there seeks to assert its rights, it ought to be recognized, and its rights ought to be enforced, where to do so would not prejudice the state or its citizens.⁴

³ 7 Mart. 6 S. (La.) 34, 12 Am. Dec. 494, 1 Cumming, Cas. Priv. Corp. 32.

⁴ And see *Blackstone Manuf'g Co. v. Inhabitants of Blackstone*, 13 Gray (Mass.) 488.

It is well settled, according to the principle of these cases, that a corporation can, by its agents, go into another state than that by which it was created, and make any contract, or take any conveyance, that is within the powers conferred upon it by its charter, provided the state in which the contract or conveyance is made has not prohibited such a transaction, and the transaction is not contrary to the policy of its laws.⁶ And it is equally well settled, subject to the same limitations, that a corporation may maintain actions and enforce its rights in another state or country, if it does not seek to enforce claims contrary to its laws.⁶

Though the rules of comity by which foreign corporations are recognized and their rights enforced are subject to local modification by the lawmaking power, until so modified they have the force of legal obligation. It is the duty of the courts to respect them until the legislature sees fit to modify them.⁷ This principle of comity is a part of our common law.⁸

Right to Exclude or to Impose Conditions.

A corporation created by one state or by a foreign government can exercise none of the functions or privileges conferred by its charter in any other state or country, except by the comity and consent of the latter.* Any other state or country than that of its creation may ex-

⁶ *Kennebec Co. v. Augusta Ins. & Banking Co.*, 6 Gray (Mass.) 204; *Hutchins v. Mining Co.*, 4 Allen (Mass.) 580; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776 (where it was held that a Wisconsin corporation could take lands by devise in Illinois); *Bard v. Poole*, 12 N. Y. 495 (where it was held that a Maryland corporation could make loans secured by mortgage on real estate in New York); *Merrick v. Van Santvoord*, 34 N. Y. 208; *Lancaster v. Improvement Co.*, 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 (where it was held that there was nothing in the laws of New York, or their general policy, to prohibit foreign corporations from acquiring land in the state); *Less v. Ghio*, 92 Tex. 651, 51 S. W. 502; *Floyd v. National Loan & I. Co.*, 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805; *Chicago Title & T. Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940. Where a Massachusetts statute prohibited any foreign corporation from engaging in any business the transaction of which by domestic corporations was not permitted, although corporations could not be there organized to manufacture intoxicating liquors, but corporations might be organized to sell them, a foreign corporation chartered to manufacture and sell intoxicating liquors could sell them within the state. *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855.

⁶ Post, p. 625.

⁷ *Merrick v. Van Santvoord*, 34 N. Y. 208, 217.

⁸ *Elston v. Piggott*, 94 Ind. 17.

* It cannot exercise the right of eminent domain without such consent. *Saunders v. Bluefield W. W. & Imp. Co. (C. C.)* 58 Fed. 133; *Dodge v. City*

clude it altogether, if it sees fit, or it may impose such terms as it chooses as a condition of allowing it to do business.⁹ A corporation, as it has been expressed, "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place."¹⁰ As was said in *Paul v. Commonwealth of Virginia*,¹¹ a "corporation, being the mere creature of a local law, can have no legal existence beyond the limits of the sovereignty where created. * * * The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The provision of the federal constitution that the citizens of each state of the Union shall be entitled to all the privileges and immunities of citizens in the several states does not require one state to recognize corporations created by another; for, though a corporation is to be regarded as a citizen for some purposes,¹² it is not a citizen within the meaning of that provision. "The privileges and immunities

of Council Bluffs, 57 Iowa, 560, 10 N. W. 886; *St. Louis & S. F. R. Co. v. Southwestern Tel. & T. Co.*, 121 Fed. 276, 58 C. C. A. 198.

⁹ *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Liverpool Ins. Co. v. Oliver*, 10 Wall. 566, 19 L. Ed. 1029; 1 *Cumming, Cas. Priv. Corp.* 26; *Bank of Augusta v. Earle*, 13 Pet. 519, 585, 10 L. Ed. 274; *New York, L. E. & W. R. Co. v. Com.*, 129 Pa. 463, 18 Atl. 412, 15 Am. St. Rep. 724; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204, 13 N. E. 705; *Goldsmith v. Insurance Co.*, 62 Ga. 379; *People v. Fire Ass'n of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State v. Phoenix Fire Ins. Co.*, 92 Tenn. 420, 21 S. W. 893; *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; *Woodson v. State*, 69 Ark. 521, 65 S. W. 465; *Com. v. Read Phosphate Co.*, 113 Ky. 32, 67 S. W. 45; *Attorney General v. Electric Storage B. Co.*, 188 Mass. 239, 74 N. E. 467; *State v. Virginia-Carolina C. Co.*, 71 S. C. 544, 51 S. E. 455.

¹⁰ *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354.

¹¹ 8 Wall. 168, 19 L. Ed. 357.

¹² Ante, p. 21.

secured to citizens of each state in the several states by the provision in question are those privileges and immunities which are common to the citizens in the latter states, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation except by the permission, express or implied, of those states. The special privileges which they confer must therefore be enjoyed at home, unless the assent of other states to their enjoyment therein be given."¹³ A corporation is a person within the constitutional provision that "no state shall deny to any person within its jurisdiction the equal protection of its laws."¹⁴ But a corporation is not within the jurisdiction of a state until it has granted the corporation permission to do business within its limits; and consequently the prohibition does not prevent a state from imposing conditions upon allowing a foreign corporation to do business.¹⁵ Once admitted, however, a foreign corporation is entitled to "the equal protection of the laws," and to as favorable treatment as a domestic corporation.¹⁶

According to this principle, it is well settled that a state may impose a tax or license fee upon a foreign corporation, as a condition of allowing it to do business within its limits; and it can make no difference that a less tax, or no tax at all, is imposed upon domestic corporations engaged in the same business.¹⁷ Foreign corporations are thus put at a disadvantage in competing with domestic corporations, but of this they cannot complain.

¹³ *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357. And see *Bank of Augusta v. Earle*, 18 Pet. (U. S.) 519, 585, 10 L. Ed. 274; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *Ducat v. City of Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Tatem v. Wright*, 23 N. J. Law, 429; *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 482; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Attorney General v. Electric Storage B. Co.*, 188 Mass. 239, 74 N. E. 467.

¹⁴ *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, *supra*; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Hammond Beef & P. Co. v. Best*, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 523.

¹⁵ *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, *supra*; *Norfolk & W. R. Co. v. Pennsylvania*, *supra*; *Manchester Fire Ins. Co. v. Herriott (C. C.)* 91 Fed. 711; *ante*, p. 21.

¹⁶ See *Pembina Con. Silver Mining & Milling Co.*, *supra*; *New York v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323.

¹⁷ *Liverpool Ins. Co. v. Oliver*, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; 1 *Cumming*, *Case Priv. Corp.* 26; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Blackstone Manuf'g Co.*

A foreign corporation may also be required to make a deposit with an officer of the state for the purpose of securing persons who contract with it.¹⁸ This is often required of foreign insurance companies. So, a state may require the agent of a foreign insurance company to retain money of the company until a loss of which he has notice is paid.¹⁹

A state may, and most states do, impose the condition that foreign corporations, in order to do business within the state, shall consent to be sued in its courts, and shall have a known place of business and appoint a resident agent within the state, upon whom process may be served in actions that may be brought against them.²⁰ Indeed, as we shall see, if a corporation of one state does business in another, no express consent on its part to be sued in the latter need be shown, for its consent will be presumed.²¹

If a corporation created by one state is engaged in interstate commerce into or through another state, the latter cannot exclude it; for this would be an interference with interstate commerce, in violation of the constitutional grant to congress of the exclusive power to regulate commerce, and of the acts of congress on the subject.²² For instance, a state statute requiring a foreign corporation to file a certificate, or observe any other condition, before bringing an action for goods sold and delivered in the state, but made at its place of business in another state, or before otherwise making contracts in the state for carrying on commerce between the states, would be

v. Inhabitants of Blackstone, 18 Gray (Mass.) 488; *Attorney General v. Bay State Mining Co.*, 99 Mass. 148, 96 Am. Dec. 717; *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Ducat v. Chicago*, 10 Wall. (U. S.) 410, 19 L. Ed. 972; *Slaughter v. Com.*, 13 Grat. (Va.) 767; *Com. v. Milton*, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522; *Tatem v. Wright*, 23 N. J. Law, 429; *People v. Equitable Trust Co. of New London*, 96 N. Y. 387; *People v. Wemple*, 181 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; *People v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 70, 43 L. Ed. 323; *Manchester Fire Ins. Co. v. Herriott (C. C.)* 91 Fed. 711; *Blue Jacket Consol. C. M. Co. v. Scherr*, 50 W. Va. 583, 40 S. E. 514, 523; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *State v. Hammond Packing Co.*, 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459. See, also, *People v. Miller*, 181 N. Y. 328, 73 N. E. 1102.

¹⁸ *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357.

¹⁹ *Phenix Ins. Co. v. Burdett*, 112 Ind. 204, 18 N. E. 705.

²⁰ The agent need not be invested with any of the contractual powers which the corporation is permitted to exercise by its charter, but it is sufficient if he has authority to accept and receive service of process. *Nelms v. Mortgage Co.*, 92 Ala. 157, 9 South. 141; *McCall v. Mortgage Co.*, 99 Ala. 427, 12 South. 806. See, also, *New England Mortg. Security Co. v. Ingram*, 91 Ala. 387, 9 South. 140. *McLeod v. Mortgage Co.*, 100 Ala. 496, 14 South. 409.

²¹ Post, p. 625.

²² *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357.

void as an interference with interstate commerce.²³ The same is true of a statute imposing a tax upon foreign corporations as a condition of their being allowed to transport goods or passengers into or through the state.²⁴ This provision of the constitution includes telegraph corporations engaged in transmitting messages from a point in one state to a point in another.²⁵ The business of life insurance is not commerce, and therefore a state statute regulating the business of

²³ *Ante*, p. 224; *Cooper Manuf'g Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Ware v. Shoe Co.*, 92 Ala. 145, 9 South. 136; *Cook v. Brick Co.*, 98 Ala. 409, 12 South. 918; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Bateman v. Milling Co.*, 1 Tex. Civ. App. 90, 20 S. W. 931; *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785; A state law imposing a tax on foreign corporations doing business in the state, based on the amount of capital used by the corporation in such state, is not an interference with commerce. *People v. Wemple*, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542. A foreign corporation may sue where the transaction is one of interstate commerce, although it has not complied with statutory conditions. *Texas & P. Ry. Co. v. Davis*, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; *Lane & B. Co. v. City Electric L. & W. Co.*, 31 Tex. Civ. App. 449, 72 S. W. 425; *Zion C. M. Ass'n v. Mayo*, 22 Mont. 100, 55 Pac. 915. An ordinance under which a license fee may be required from an agent of a non-resident portrait company, who receives from such company pictures and frames manufactured by it to fill orders previously obtained, and, after breaking bulk and placing each picture in the frame designed for it, delivers them to the respective purchasers, is invalid as an attempt to interfere with and regulate interstate commerce. *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336.

²⁴ See *Indiana v. American Exp. Co.*, 7 Biss. 227, Fed. Cas. No. 7,021. In *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, a Kentucky statute requiring the agent of a foreign express company doing business in the state to pay a license fee of five dollars, and deposit with the auditor a statement of the company's assets and liabilities, showing that it has an actual capital of at least \$150,000, was held unconstitutional, as an interference with interstate commerce, in so far as it applied to companies transporting goods between points in the state and points in other states, although they also transported between points in the state. And see *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392; *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Pullman's Palace Car Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995 (full citation of cases); *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451.

²⁵ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Ratterman v. Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311.

foreign insurance corporations is not invalid as a regulation of commerce.²⁶

A state has the absolute right to entirely exclude a foreign corporation from its territory, or, having given it a license to do business within the state, to revoke it, in its discretion, for good cause, or without any cause at all.²⁷ And its motive in so doing is not open to inquiry. The corporation has no constitutional right to transact its business in any other state than that of its creation, and hence its exclusion therefrom violates no constitutional right. In *Doyle v. Continental Ins. Co.*²⁸ the legislature of Wisconsin had enacted that, if any foreign insurance company should transfer a suit brought against it from the state courts to the federal courts, it should thereupon become the duty of the secretary of state to cancel its license to do business within the state. It was held that an injunction could not be granted to restrain the revocation of a license for violation of the provision, though a state has no power to prohibit resort to the federal courts where they have jurisdiction, since the right to exclude foreign corporations belongs to the state, and its motive, or the means by which it accomplishes that result, are not the subject of judicial inquiry.

Such a statute, however, cannot prevent the corporation from removing a suit into the federal courts.²⁹ And, if a statute requiring a permit as a condition precedent to a foreign corporation doing business in the state requires such a stipulation before the permit shall be granted, the statute is void, and the agent of a foreign corporation could not be prosecuted for violating it.³⁰

A state, of course, has a perfect right to admit foreign corporations of a particular class, and exclude other classes, or it may, if it sees fit, discriminate between corporations of the same class.

²⁶ *Paul v. Virginia*, *supra*; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (marine insurance); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116 (life insurance).

²⁷ *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, affirmed 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

²⁸ 94 U. S. 535, 24 L. Ed. 148. See comments on this by Mr. Justice Peckham in *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188.

²⁹ *Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365. See, also, *Cable v. United States Life Ins. Co.*, *supra*.

³⁰ *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915. See, also, *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; *Dayton Coal & I. Co. v. Barton*, 183 U. S. 23, 22 Sup. Ct. 5, 46 L. Ed. 61.

It seems to have been held, in effect, that, if a statute provides for the admission of corporations organized for a particular kind of business, it impliedly excludes corporations organized for any other business; and it has been held that a statute authorizing foreign corporations organized for a particular purpose to do business in the state does not admit a foreign corporation organized for the purpose specified, and also for other purposes.²¹

With the question of the expediency or policy of the statutes imposing conditions upon foreign corporations the courts have nothing to do. It is purely a legislative question. The statute must stand, unless it is plainly in conflict with some constitutional provision;²² and, if there is doubt as to its constitutionality, the doubt must be resolved in favor of the legislature.²³ "It has repeatedly been held—and there seems to be no conflict of authority—that corporations of one state have no right to exercise their franchises in another state, except upon the assent of such other state, and upon such terms as may be imposed by the state where their business is to be done. The conditions imposed may be reasonable or unreasonable. They are absolutely within the discretion of the legislature."²⁴

Foreign Corporations in Fraud of the Laws of a State, or Contrary to its Policy.

The courts of a state will not recognize as valid a corporation organized in fraud of its laws in another state, or a corporation of another state which is contrary to the policy of its laws.²⁵ In some

²¹ *Isle Royale Land Corp. v. Secretary of State*, 76 Mich. 162, 43 N. W. 14.

²² The power to exclude and to impose conditions cannot be exercised in violation of the provision against the passage by a state of a law impairing the obligation of contracts. *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. Ed. 854; *Bedford v. Eastern B. & L. Ass'n.*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834. While foreign insurance companies can enter a state to do business only by permission of the state, and subject to such regulations and conditions as it may see fit to impose, yet, where they have complied with all such conditions, and under license from the state have expended money in establishing agencies and in advertising and building up a business, they have the right to challenge the validity of statutes subsequently enacted which affect their business and interests equally with those of domestic companies. *Niagara Fire Ins. Co. v. Cornell (C. C.)* 110 Fed. 816. And see *Greenwich Ins. Co. v. Carroll (C. C.)* 125 Fed. 121. Contra, *Hartford Fire Ins. Co. v. Perkins (C. C.)* 125 Fed. 502.

²³ *Phenix Ins. Co. v. Burdett*, 112 Ind. 204, 13 N. E. 705; *State v. Carey*, 2 N. D. 36, 49 N. W. 164; *State v. Phoenix Ins. Co.*, 92 Tenn. 420, 21 S. W. 893.

²⁴ *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474, 482.

²⁵ *Hill v. Beach*, 12 N. J. Eq. 81; *Land Grant Railway & Trust Co. v. Board Co. Com'rs Coffey Co.*, 6 Kan. 245; *Carroll v. City of East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *Demarest v. Flack*, 128 N. Y. 205, 28 N. E. 645,

states the laws for the formation of corporations are more favorable than in others, and, for this reason, residents of a state sometimes go into another state and form a corporation under its laws for the purpose of doing business in the state of their residence. Whether such corporations will be recognized as valid in the state of the incorporators' residence depends upon whether the incorporation is to be regarded as an evasion of and fraud upon its laws. Some courts seem to have held that the mere fact that residents of a state go into another state and form a corporation for the purpose of doing business in the state of their residence is an evasion of the laws of the state in which they are incorporated, and a fraud upon such laws.⁸⁶ But, by the better opinion, there must be something more than this to make out a case of fraud upon the laws of either state. There must be some express prohibition against such an incorporation, or else the general policy of the laws must be against it. The question arose in New York in *Demarest v. Flack*.⁸⁷ In this case the defendants, residents of New York, had formed a corporation under the laws of West Virginia for the purpose of doing business in New York, and were doing business there as a foreign corporation. The plaintiff, a resident of New York, seeking to hold them liable as if unincorporated, contended (1) that these facts conclusively proved that the incorporation was invalid, so far, at least, as the state of New York and its citizens were concerned; or, (2) if this was not so, that the facts rendered it a question for the determination of the jury whether the incorporation was attempted to be made in good faith, or as a mere evasion and in fraud of the laws of West Virginia or of New York, and that, if the jury should find the latter to be the case, the incorporation would be void. The court, after pointing out that the laws of both states permitted incorporation for the purposes for which this corporation had been formed; that the freedom of the members from personal liability would be as great and as easily attained, and the security of creditors would not be substantially greater, in case

13 L. R. A. 854; *Van Steuben v. Central R. Co.*, 178 Pa. 367, 35 Atl. 992, 34 L. R. A. 577.

⁸⁶ *Hill v. Beach*, 12 N. J. Eq. 31.

⁸⁷ 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854. And see, to the same effect, *Lancaster v. Improvement Co.*, 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322, where a corporation was formed under the laws of New Jersey to do business in New York. And see *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784; *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729; *State v. Topeka Water Co.*, 61 Kan. 547, 60 Pac. 337; *Cumberland Tel. & T. Co. v. Louisville Home Tel. Co.*, 114 Ky. 892, 72 S. W. 4; *State v. Cook*, 181 Mo. 596, 80 S. W. 929.

of incorporation under the laws of New York; that the policy of West Virginia plainly favored the formation under its laws of corporations composed of nonresidents, the principal business of which was to be done outside the state; and that the policy of New York was to recognize foreign corporations formed for the purpose of doing business there,—held that the incorporation was valid, both in West Virginia and in New York. The court also held that whether there was an attempted evasion of the laws of New York was a question of law, for the court, and should not be submitted to a jury as a matter of fact.³⁸

A foreign corporation will not be recognized in a state if it is contrary to the policy of its laws, as where the laws expressly or impliedly prohibit corporations of its character, or a corporation for such purposes.³⁹ It was held by the Illinois court that a corporation created by the laws of Connecticut for the sole purpose of buying and selling lands had no power to purchase and hold lands in Illinois, as it was against the general policy of the laws of that state on the subject of domestic corporations, and would tend to create perpetuities.⁴⁰

It is for the legislature to determine what shall be the public policy of the state, and in the absence of legislation prohibiting an act the case must be a very clear one to justify the courts in declaring it against public policy.⁴¹ Accordingly it is generally held that the mere fact that the legislature has not created or authorized the organization of corporations with power to do a certain act is not enough to show

³⁸ In regard to the latter point, it was said that, if the question were submitted to the jury, "we might find different juries coming to different conclusions upon the same facts, and we should have a corporation or no corporation, according to the view a jury might take of such facts. One plaintiff might prove the evasion to the satisfaction of one jury, and another plaintiff fail on precisely the same facts; and thus we should have a corporation as to A., and no corporation as to B., and the same question constantly arising as often as the corporation or its members were sued. This would be intolerable. It must be a corporation as to all persons with whom it has business dealings, or as to none. In other words, it must be a question of law, instead of fact."

³⁹ *Land Grant Railway & Trust Co. v. Board Co. Com'rs Coffey Co.*, 6 Kan. 245; *Carroll v. City of East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632. A foreign corporation, with right under its charter not sanctioned by the laws of Louisiana, will not be prevented from doing a legitimate business under that portion of its charter which conforms to her laws. *State v. New Orleans Warehouse Co.*, 109 La. 64, 33 So. 81. See, also, *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855.

⁴⁰ *Carroll v. City of East St. Louis*, *supra*. See *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

⁴¹ *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243; *Stevens v. Pratt*, 101 Ill. 206; *Cowell v. Springs Co.*, 100 U. S. 59, 25 L. Ed. 547.

that it is against public policy to permit a foreign corporation to do such an act.⁴²

Retaliatory Statutes.

In some of the states what are known as "retaliatory statutes" have been enacted, the object being to prevent other states from imposing greater burdens and restrictions upon corporations of the state by which the statute is enacted than are imposed by that state upon corporations of such other states. Thus, in Illinois it is provided that whenever the existing or future laws of any state shall require of insurance companies incorporated under the laws of Illinois, and having agencies in such other state, any deposit, or the payment of any tax, license fee, etc., greater than the amount required for such purposes for similar companies by the then existing laws of Illinois, then all companies of such state establishing or having an established agency in Illinois shall be required to pay to the auditor for taxes, license fees, etc., an amount equal to the amount required by the laws of such other state.⁴³ And in many states there are statutes in effect providing generally that foreign corporations shall not exercise any privileges in the state which are not accorded by the state by which they are created to similar foreign corporations.⁴⁴ Such statutes as these are valid, unless they violate some particular provision of the state constitution.⁴⁵

A foreign corporation which has complied with the local laws should not, as a measure of retaliation, under a retaliatory statute, be excluded from doing business in the state upon the ground that the laws of the state by which it was created would exclude foreign cor-

⁴² *Cowell v. Springs Co.*, supra; *Stevens v. Pratt*, supra; *Deringer's Adm'r v. Deringer's Adm'r*, 5 *Houst. (Del.)* 416, 1 *Am. St. Rep.* 150. But see *Empire Mills v. Alston Grocery Co.*, 4 *Wills on, Civ. Cas. Ct. App. (Tex.)* § 221, 15 *S. W.* 200, 505; *Van Steuben v. Central R. Co.*, 178 *Pa.* 367, 35 *Atl.* 992, 34 *L. R. A.* 577; *State v. Cook*, 171 *Mo.* 348, 71 *S. W.* 829.

⁴³ This law becomes operative upon the enactment by the other state of the law with the additional requirements, and it is immaterial that there are no Illinois corporations doing business in such state. *Germania Ins. Co. v. Swigert*, 128 *Ill.* 237, 21 *N. E.* 530, 4 *L. R. A.* 473; *State v. Fidelity & Casualty Co.*, 77 *Iowa*, 648, 42 *N. W.* 509. But see *State v. Insurance Co.*, 49 *Ohio St.* 440, 31 *N. E.* 658, 16 *L. R. A.* 611, 34 *Am. St. Rep.* 573; *State v. Insurance Co. (Neb.)* 100 *N. W.* 405.

⁴⁴ See *State v. Western Union Mut. Life Ins. Co.*, 47 *Ohio St.* 167, 24 *N. E.* 392, 8 *L. R. A.* 129; *Wolf v. Lancaster*, 70 *N. J. Law*, 201, 56 *Atl.* 172, and other cases cited in the preceding and following notes.

⁴⁵ *People v. Fire Ass'n of Philadelphia*, 92 *N. Y.* 311, 44 *Am. Rep.* 380; *Home Ins. Co. v. Swigert*, 104 *Ill.* 666; *State v. Insurance Co. of North America*, 115 *Ind.* 257, 17 *N. E.* 574; *Talbott v. Casualty Co.*, 74 *Md.* 536, 22 *Atl.* 395, 13 *L. R. A.* 584; *State v. Insurance Co. (Neb.)* 99 *N. W.* 36.

porations from doing business there under like conditions, unless it is clear that such is the effect of the law. Rules of comity require that doubt in such a case should be resolved in favor of the corporation.⁴⁶

What Constitutes "Doing Business" in the State.

Questions frequently arise as to what constitutes "doing business" in the state, within the meaning of the statutes relating to foreign corporations, and the answer is not always clear. If a foreign corporation continuously does any substantial part of its business in the state, however little, it is within the statute.* Clearly, it does business in the state if it has an office and sells some of its goods there, or enters into a contract by which it is to have the management of the manufacturing in a factory and keep it supplied with a superintendent,⁴⁷ or has a resident agent to conduct a part of its business.⁴⁸ But a corporation is not doing business in the state because a transaction is partly effected there, if it is consummated outside the state;⁴⁹ as

⁴⁶ State v. Fidelity & C. Ins. Co., 39 Minn. 538, 41 N. W. 108; State v. Insurance Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573.

* Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; People v. Roberts, 152 N. Y. 59, 46 N. E. 161, 36 L. R. A. 756; Farmers' Loan & T. Co. v. Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55; Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; Bule v. Chicago, R. I. & P. Ry. Co., 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861. A foreign insurance company is doing business within the state, so far as the question of the power of a federal court, sitting in that state, to obtain jurisdiction over such corporation, is concerned, where, under the terms of its policies covering property in that state, it sends its agents there to adjust losses. Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810. See, also, Elliott v. Parlin & O. Co., 71 Kan. 665, 81 Pac. 500.

⁴⁷ People v. Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; People v. Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155. See, also, Copland v. American D. Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501.

⁴⁸ Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328.

⁴⁹ Cone v. Tuscoloosa Mfg. Co. (C. C.) 76 Fed. 891; United States Loan Co. v. Miller (Tenn. Ch. App.) 47 S. W. 17; Fay Fruit Co. v. McKinney, 103 Mo. App. 304, 77 S. W. 160; Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111. Cf. Honeyman v. Colorado Fuel & I. Co. (C. C.) 133 Fed. 96. Where a foreign corporation came into New Jersey and organized and controlled a corporation, causing it to issue its bonds and stock, and took them and purchased stocks held in various New Jersey corporations, and also took from such stockholders sums of money as further consideration, and gave a guaranty that another corporation would pay the interest on its bonds, such transactions amounted to a doing of business. Groel v. United Electric Co. (N. J. Ch.) 60 Atl. 822.

⁵⁰ Holder v. Aultman, Miller & Co., 169 U. S. 81, 18 Sup. Ct. 269; 42 L.

where an agent solicits orders in the state, but the sale is consummated outside the state;⁵¹ or where an application for insurance is made in the state, but the acceptance and issue of a policy thereon is at the home office in another state.⁵² Nor does the statute apply to a loan, although on the security of land within the state, made outside the state;⁵³ or to a contract made outside the state by which the title to land in the state is acquired.⁵⁴ Nor does a foreign corporation do business in the state by a mere consignment of goods for sale to a factor therein, since in such case the factor and not the consignor does the business of selling and collecting.⁵⁵ The prosecution or defense of an action is not doing business in the state.⁵⁶

Ed. 669; Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864; Boardman v. S. S. McClure Co. (C. C.) 123 Fed. 614.

⁵¹ Toledo Commercial Co. v. Glass Mfg. Co., 55 Ohio St. 217, 45 N. E. 197; Droege v. Ahrens & O. M. Co., 163 N. Y. 466, 57 N. E. 747; Cummer Lumber Co. v. Associated Mfrs.' M. F. Ins. Corp., 67 App. Div. 151, 73 N. Y. Supp. 668, affirmed 173 N. Y. 633, 66 N. E. 1106; Harvard Co. v. Wicht, 99 App. Div. 507, 91 N. Y. Supp. 48; Wolff Dryer Co. v. Bigler, 192 Pa. 466, 43 Atl. 1092; Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616; Belle City Mfg. Co. v. Frizzell (Idaho) 81 Pac. 58.

⁵² Hazeltine v. Mississippi Valley F. Ins. Co. (C. C.) 55 Fed. 743; Fulton v. Commercial T. M. A. Ass'n, 172 Pa. 117, 33 Atl. 324; State Mut. F. Ins. Co. v. Brinkley Stave & H. Co., 61 Ark. 1, 31 S. W. 158, 29 L. R. A. 712, 54 Am. St. Rep. 191.

⁵³ Scruggs v. Mortgage Co., 54 Ark. 566, 16 S. W. 563; Reeves v. Harper, 43 La. Ann. 516, 9 South. 104; Caesar v. Capell (C. C.) 83 Fed. 403; Sullivan v. Sheehan (C. C.) 89 Fed. 247; Neal v. New Orleans Loan B. & S. Ass'n, 100 Tenn. 607, 46 S. W. 755; People's Building L. & S. Ass'n v. Berlin, 201 Pa. 1, 50 Atl. 308, 88 Am. St. Rep. 764.

⁵⁴ Goldsbery v. Carter, 100 Va. 438, 41 S. E. 858. The mere ownership of lands in New Mexico by a railroad company organized and existing under the act of congress of March 3, 1897, c. 374, 29 Stat. 622, none of whose offices are located in the territory, or the bringing of suits in that territory to protect its lands against trespasses, is not sufficient, under Comp. Laws N. M. 1897, § 450, to authorize the service of summons upon its president while passing through the territory on a railroad train, in a personal action in which an attachment may be levied upon the lands to satisfy any judgment that may be obtained, even assuming that the provisions of this statute could be made applicable to a corporation created by an act of congress. New Mexico v. Baker, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. Ed. 540.

⁵⁵ Bertha Zinc & Mineral Co. v. Clute, 7 Misc. Rep. 123, 27 N. Y. Supp. 342; Allen v. Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714. And see Hovey's Estate, 198 Pa. 385, 48 Atl. 311.

⁵⁶ Utley v. Mining Co., 4 Colo. 369; Powder River Cattle Co. v. Commissioners, 9 Mont. 145, 22 Pac. 383; Christian v. Mortgage Co., 89 Ala. 198, 7 South. 427; McCall v. Mortgage Co., 99 Ala. 427, 12 South. 806; Reed v. Walker, 2 Tex. Civ. App. 92, 21 S. W. 687; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; Fuller & J. Manuf'g Co. v. Foster, 4 Dak. 329, 30 N. W. 166; Buffalo Zinc & C. Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91

It is generally held that doing a single act of business does not bring a corporation within the statute.⁸⁷ The supreme court of the United States has held that a statute or constitutional provision prohibiting a foreign corporation from doing "any business" in the state until it has complied with the conditions imposed contemplates carrying on a continuous business in the state, and does not apply to a single act of business when there was no purpose to do any other act of business or have a place of business in the state.⁸⁸ Thus these statutes are not to be construed as preventing a corporation from doing isolated and independent acts incidental to its business, such as making a contract,⁸⁹ a sale,⁹⁰ a purchase,⁹¹ an insurance policy,⁹² or as taking a mortgage,⁹³ or accepting a note.⁹⁴ In some jurisdictions, however, a stricter construction prevails, and it is held that a single act of ordinary business is within the statute. Thus it has been held in Alabama that a corporation organized for the purpose of lending money on real estate security does business by making a single loan and taking a mortgage to secure it.⁹⁵

Am. St. Rep. 87; *Chicago Title & T. Co. v. Rashford*, 120 Wis. 281, 97 N. W. 940; *Alley v. Bowen-Merrill Co.* (Ark.) 88 S. W. 838.

⁸⁷ *Farrior v. Security Co.*, 88 Ala. 275, 7 South. 200; *Ginn v. Security Co.*, 92 Ala. 185, 8 South. 888; *Ammons v. Brunswick-Balke C. Co.*, 5 Ind. T. 636, 82 S. W. 987; *Frawley, B. & W. v. Pennsylvania Casualty Co.* (C. C.) 124 Fed. 259 (full citation) and cases in following notes.

⁸⁸ *Lamb v. Lamb*, 6 Biss. 420, Fed. Cas. No. 8,018. A single transaction may be a doing of business, where it is part of the ordinary business of the corporation and indicates a purpose to carry on a substantial part of its dealings in the state. *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 76 Pac. 863. And see *New Haven Pulp & B. Co. v. Downingtown Mfg. Co.* (C. C.) 130 Fed. 605.

⁸⁹ *Empire Milling & M. Co. v. Tombstone Milling & M. Co.* (C. C.) 100 Fed. 910; *Babbitt v. Field*, 6 Ariz. 6, 52 Pac. 775; *Davis & R. B. & N. Co. v. Calgle* (Tenn. Ch. App.) 53 S. W. 240; *Henry v. Simanton*, 64 N. J. Eq. 572, 54 Atl. 153; *Hogan v. City of St. Louis*, 176 Mo. 149, 75 S. W. 604; *Sigel-Campion L. S. C. Co. v. Haston*, 68 Kan. 749, 75 Pac. 1028; *New York Architectural T. C. Co. v. Williams*, 102 App. Div. 1, 92 N. Y. Supp. 808.

⁹⁰ *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667; *Delaware & H. C. Co. v. Mahlenbrock*, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 538.

⁹¹ *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 26 Pac. 325, 22 Am. St. Rep. 438; *Crook v. Girard Iron & M. Co.*, 87 Md. 138, 89 Atl. 94, 67 Am. St. Rep. 825.

⁹² *Tabor v. Manufacturing Co.*, 11 Colo. 419, 18 Pac. 537.

⁹³ *Gilchrist v. Railroad Co.* (C. C.) 47 Fed. 583; *Keene Guar. Sav. Bank v. Lawrence*, 82 Wash. 572, 73 Pac. 680; *New York & S. C. Co. v. Winton*, 208 Pa. 467, 57 Atl. 955. See *Com. v. Standard Oil Co.*, 101 Pa. 119; *Fuller & J. Mfg. Co. v. Foster*, 4 Dak. 329, 30 N. W. 166.

⁹⁴ *Creteau v. Foote & T. Co.*, 40 App. Div. 215, 57 N. Y. Supp. 1103; *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22.

⁹⁵ See, also, *Denson v. Chattanooga Nat. Bldg. Ass'n*, 107 Fed. 777, 46 C.

Effect of Noncompliance with Conditions.

The statutes imposing conditions upon foreign corporations vary in the different states, and even where they are similar the courts do not agree in construing them, and as to the effect of contracts and transactions in violation of their terms. In all cases the object is to ascertain the intention of the legislature, and when the intention is ascertained it must be given effect.

Many courts hold that such a statute does not render void contracts or transactions by foreign corporations before compliance with the conditions, but that the corporation merely renders itself subject to exclusion at the instance of the proper authorities, and to suspension of its civil remedies until compliance if compliance be made a condition of the right to sue.⁶⁶ Where this rule prevails notwithstanding non-compliance suit may be brought on such a contract in a federal court,⁶⁷ or in the court of another state.⁶⁸ This is perhaps the prevailing view. Other courts hold, however, that all contracts entered into in violation of the statute are void, on the ground that where no other penalty is attached this is the only effective way of enforcing the prohibition.⁶⁹

C. A. 634, affirmed 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870 (under Alabama statute); Nelson, Morris & Co. v. Rehkopf, 75 S. W. 203, 25 Ky. Law Rep. 352.

⁶⁶ Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Wright v. Lee, 4 S. D. 237, 55 N. W. 931; Jarvis-Conklin M. T. Co. v. Willhoit (C. C.) 84 Fed. 514; Neuchatel Asphalte Co. v. Mayor, etc., 155 N. Y. 873, 49 N. E. 1043; Rockford Ins. Co. v. Rogers, 9 Colo. App. 121, 47 Pac. 849; Security Savings & L. Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753; North Mercer Natural Gas Co. v. Smith, 27 Ind. App. 472, 61 N. E. 10; C. B. Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. 580; Enterprise Brewing Co. v. Grime, 178 Mass. 252, 53 N. E. 855 (cf. Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59); Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Chicago Mill & L. Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128; State v. American Book Co., 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041; Thompson v. National Mut. B. & L. Ass'n, 57 W. Va. 551, 50 S. E. 756.

⁶⁷ Sullivan v. Beck (C. C.) 79 Fed. 200.

⁶⁸ Allegheny Co. v. Allen, 69 N. J. Law, 270, 55 Atl. 724.

⁶⁹ In re Comstock, 3 Sawy. 218, Fed. Cas. No. 3,078; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520; Hoffman v. Banks, 41 Ind. 1; Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Union Cent. Life Ins. Co. v. Thomas, 46 Ind. 44; Bank of British Columbia v. Page, 6 Or. 435; Aetna Ins. Co. v. Harvey, 11 Wis. 395; Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59; National Mut. Fire Ins. Co. v. Pursell, 10 Allen (Mass.) 232; Jones v. Smith, 3 Gray (Mass.) 500; Neuchatel Asphalt Co. v. Mayor, etc., 9 Misc. Rep. 376, 80 N. Y. Supp. 252; Barbor v. Boehm, 21 Neb. 450, 32 N. W. 221; Northwestern Mut. Life Ins. Co. v. Elliott (C. C.) 5 Fed. 225; Myers Mfg. Co. v. Wetzel (Tenn. Ch. App.) 35 S. W. 896; Henni v. Fidelity Bldg. & L. Ass'n, 61 Neb. 744, 86 N. W. 475, 87 Am. St. Rep. 519; Tri-State, etc., Co. v. Forest Park, etc., Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688; A. Booth & Co. v. Weigend, 28 Utah, 372, 79 Pac.

Some of the statutes not only prohibit doing business before compliance with their terms, but also impose a penalty for their violation, and others impose a penalty without express prohibition. Some courts hold that the legislature, by annexing a specific penalty, manifests an intention that the penalty shall be exclusive, and that contracts made before compliance with the statute are valid.⁷⁰ Other of the courts, however, hold that the annexation of a penalty renders all acts which subject the party to the penalty unlawful, and therefore unenforceable, under the generally accepted rules⁷¹ that, where a statute prohibits an act and attaches a penalty, it renders the act unlawful, and that attaching a penalty without express prohibition is an implied prohibition.⁷² If the statute is not in terms prohibitory, and the penalty is imposed as a tax, and for purposes of revenue, and not by way of punishment, it does not prohibit contracts before compliance with its terms.⁷³ Where a statute, as is sometimes the case, merely requires foreign corporations to file a copy of their charter, or observe other requirements, within a certain time

570; *United States Rubber Co. v. Butler Bros. S. Co.* (C. C.) 132 Fed. 398. "When the legislature prohibits an act," said the Illinois court, "or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give to the person or corporation or individual the same rights in enforcing prohibited contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements." *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, *supra*.

⁷⁰ *Toledo Tie & Lumber Co. v. Thomas*, 83 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Harris v. Runnels*, 12 How. (U. S.) 79, 13 L. Ed. 901; *Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 38 Pac. 260, 24 L. R. A. 315, 40 Am. St. Rep. 910; *La France Fire Engine Co. v. Town of Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 189, 37 Atl. 948, 38 L. R. A. 545, 78 Am. St. Rep. 852; *Jarvis-Conklin Mortg. Trust Co. v. Willholt* (C. C.) 84 Fed. 514.

⁷¹ *Clark*, *Cont.* (2d Ed.) 260.

⁷² *Dudley v. Collier*, 87 Ala. 431, 6 South. 304, 18 Am. St. Rep. 55; *Buxton v. Hamblen*, 32 Me. 448; *Thorne v. Insurance Co.*, 80 Pa. 15, 21 Am. Rep. 89; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *McCanna & F. Co. v. Citizens' Trust & S. Co.*, 78 Fed. 420, 24 C. C. A. 11, 35 L. R. A. 236; *Chattanooga Nat. B. & L. Ass'n v. Denson*, 189 U. S. 410, 23 Sup. Ct. 630, 47 L. Ed. 870 (Alabama statute); *Hanchey v. Southern Home B. & L. Ass'n*, 140 Ala. 245, 37 South. 272.

⁷³ See *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346.

after commencing business in the state, and imposes a penalty upon their officers or agents if they fail to do so, it has been held that it is not to be construed as prohibiting continuance of business after such failure, so as to avoid their contracts, the only penalty incurred being the penalty imposed by the statute.⁷⁴

A statute making it unlawful for foreign corporations to do business without first complying with the requirements has no application to contracts entered into before its enactment.⁷⁵

It is held that a statute forbidding any foreign corporation to do business in the state until it has complied with the conditions prescribed, and imposing a penalty for its violation, but which imposes no duty or prohibition upon persons dealing with a corporation which has not complied with the law, does not render its contracts void as to such persons, so as to prevent them from maintaining an action thereon. For instance, it is held that a policy of insurance issued by a foreign insurance company, which has not complied with the law so as to be entitled to do business in the state, may nevertheless be enforced by the assured. Some courts base this rule on the ground that the corporation is estopped to set up its noncompliance with the law to escape liability on its contracts.⁷⁶ Others base it upon the ground that the statute is intended for the protection of persons dealing with the corporation, and that the legislature did not intend to avoid its contracts to their prejudice.⁷⁷

Estoppel.

If a corporation does business in another state without complying with the conditions precedent imposed by the state, it cannot escape liability on contracts made by it on the ground that it was not qualified to do business in the state. It is estopped to set up such a defense. It was so held by Judge Caldwell where a life insurance company set up such a defense to defeat an action on a policy issued by it. "By the fact of doing business in the state," he said, "it asserted

⁷⁴ *Northwestern Mut. Life Ins. Co. v. Overholt*, 4 Dill. 287, Fed. Cas. No. 10,338; *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Slauson v. Schwabacher*, 4 Wash. 783, 31 Pac. 829, 31 Am. St. Rep. 948; *Whitman Agricultural Co. v. Strand*, 8 Wash. 647, 36 Pac. 682.

⁷⁵ *Security Savings & L. Ass'n v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Standard Sewing-Mach. Co. v. Frame*, 2 Pennewill (Del.) 430, 48 Atl. 188; *Richardson v. United States M. & T. Co.*, 194 Ill. 259, 62 N. E. 606; *Keystone Mfg. Co. v. Howe*, 89 Minn. 256, 94 N. W. 723.

⁷⁶ See following paragraph.

⁷⁷ *Pennypacker v. Insurance Co.*, 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *The Manistee*, 5 Biss. 382, Fed. Cas. No. 9,027; *Ehrman v. Insurance Co.* (D. C.) 1 Fed. 471.

a compliance with the laws of the state, and after enjoying all the benefits of that business, and receiving the money of the assured, it will not be heard to say that it never submitted 'to the jurisdiction of the state.' It can reap no advantage from its own wrong."¹⁸ And the estoppel extends to agents and members of the corporation who participate in the unauthorized transactions.¹⁹

Some of the courts hold that, if a foreign corporation makes a contract which is within the powers conferred upon it by its charter, the other party cannot escape the obligations imposed upon him by the contract, nor dispute the rights of the corporation under it, on the ground that it had not complied with the law imposing conditions upon its right to do business in the state; the corporation being regarded as in the position of a *de facto* corporation, whose contracts are valid, the state only having the right to object, or else the other party being held to be estopped to dispute the validity of the contract.²⁰ Other courts take the position that the statute is based upon grounds of public policy, and the contract, being prohibited, is illegal and void, and that the doctrine of estoppel does not extend so far as to enable a person or corporation to do in effect what is forbidden by law. And they therefore hold that in such a case the other party to the contract is not estopped to show the illegality of the contract for the purpose of preventing a recovery upon it.²¹

¹⁸ *Berry v. Indemnity Co.* (C. C.) 46 Fed. 439. And see *Ehrman v. Insurance Co.* (D. C.) 1 Fed. 471; *Ganser v. Fireman's Fund Ins. Co.*, 84 Minn. 372, 25 N. W. 943; *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85, 30 N. E. 772; *Sparks v. National Masonic A. Ass'n*, 100 Iowa, 466, 69 N. W. 678; *Fisher v. Traders' Mut. Ins. Co.*, 136 N. C. 217, 48 S. E. 667. In *re Naylor Mfg. Co.* (D. C.) 135 Fed. 206.

¹⁹ *Kilgore v. Smith*, 122 Pa. 48, 15 Atl. 698.

²⁰ See ante, p. 78, as to *de facto* corporations. *Sherwood v. Alvia*, 83 Ala. 115, 3 South. 307, 3 Am. St. Rep. 696. In this case the defendant had obtained a loan from a foreign corporation engaged in lending money in Alabama, and had given a mortgage to secure the same. In an action by the purchaser at a sale under the mortgage for possession, the defendant contended that the mortgage was void because the corporation had no known place of business, or authorized agent, within the state, as required by law. It was held that he was estopped to set up such a defense. For other decisions in support of the test, see *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706; *Washburn Mill Co. v. Bartlett*, 8 N. D. 138, 54 N. W. 544. And see *American Loan & Trust Co. v. East & West B. Co.* (C. C.) 37 Fed. 242; *La France Fire Engine Co. v. Town of Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; *Rathbone, Bard & Co. v. Frost*, 9 Wash. 162, 37 Pac. 298.

²¹ In *re Comstock*, Fed. Cas. No. 3,078; *Williams v. Cheney*, 3 Gray (Mass.) 222; *National Mut. Fire Ins. Co. v. Pursell*, 10 Allen (Mass.) 232; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 90, 3 Am. Rep. 626; *Aetna Ins. Co. v. Harvey*, 11 Wis. 396; *Delaware R. Q. & C. Co. v. Bethlehem & N. P. Ry. Co.*, 204 Pa. 22, 53 Atl. 533.

Powers of Foreign Corporation—Limitation of Charter.

The rule of comity by which a corporation is permitted to do business in another state than that by which it was created does not change its nature as a foreign corporation, or give it any powers which are not given by its charter. Nor does it exempt persons who deal with it from the effect of legislation by the state or country of its creation under power reserved under its law. "Though permitted to come into the local jurisdiction, and there exercise its powers, for the accomplishment of the purposes of its creation, it remains essentially a foreign corporation. It derives its vitality, its corporate capacity, its very life, from the law of its origin. Comity adds to it no new function, or greater powers than are bestowed upon it by its charter. That, being the instrument of the company's creation, and prescribing the limits of its legal existence, must exert the most obvious influence upon all its transactions; and, whether abroad or at home, it can do nothing which does not fairly fall within the scope and purpose of that instrument."⁸² And persons dealing with a foreign corporation must take notice of the limitations in its charter, and also of the power over it reserved to the state or country to which it owes its being, and they are bound accordingly.⁸³ "Wherever a corporation goes for business, it carries its charter, as that is the law of its existence, and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere."⁸⁴

If a foreign corporation whose existence and legal organization are not disputed has made a contract in a state through agents employed by it, and a suit is brought against it thereon in such state, in such a manner that it is made amenable to the jurisdiction of the court, it is not necessary for the plaintiff, at the outset, to prove that it had the power under its charter to make the contract.⁸⁵

The rules recognized in some states, that one who contracts with a

⁸² Wm. L. Murfree, Esq., in note to *Republican Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 419, 24 L. R. A. 776.

⁸³ *Canada S. Ry. Co. v. Gebhard*, 109 U. S. 527, 537, 3 Sup. Ct. 363, 369, 27 L. Ed. 1020; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Metropolitan Bank v. Godfrey*, 23 Ill. 579, 609; *Manhattan Life Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280. If the charter of a corporation, or the general laws of the state of its creation, prohibit certain contracts, as contracts between it and its officers or employes, the prohibition applies to contracts in another state. *Rue v. Railway Co.*, 74 Tex. 474, 8 S. W. 533, 15 Am. St. Rep. 852.

⁸⁴ *Canada S. Ry. Co. v. Gebhard*, *supra*.

⁸⁵ *McCluer v. Railroad*, 13 Gray (Mass.) 124, 74 Am. Dec. 624.

corporation cannot plead *ultra vires* to defeat an action on the contract, and that the corporation is estopped to set up such a defense in an action brought against it, apply to foreign corporations. Thus, a borrower from a foreign corporation, under this doctrine, cannot defeat an action by the corporation on a note or mortgage given by him, on the ground that the corporation had no authority under its charter to make the loan.⁸⁶ As we have seen, there is much conflict as to the effect of *ultra vires* contracts.⁸⁷

Same—Limitations of the Local Laws.

It does not follow, even when a corporation is recognized in another state, that it can exercise all the powers that are conferred upon it by its charter. Its powers also depend upon the law of the state in which they are exercised. In other words, its powers are limited, not only by its charter and the laws of the state of its creation, but also by the laws of the state in which it exercises them.⁸⁸ Thus, the laws of a state prohibiting corporations from holding real estate, or limiting their power in this respect, apply to foreign as well as to domestic corporations. And generally, in the absence of legislation changing the rule, a foreign corporation cannot exercise greater powers than the local laws allow to similar domestic corporations.⁸⁹

If the charter of a corporation prohibits it from taking by devise, it cannot take in another state, though there may be no prohibitory

⁸⁶ *Pancoast v. Insurance Co.*, 79 Ind. 172; *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 378.

⁸⁷ *Ante*, p. 167.

⁸⁸ *Fowler v. Bell*, 90 Tex. 150, 87 S. W. 1058, 39 L. R. A. 254, 59 Am. St. Rep. 788; *Interstate Sav. & L. Ass'n v. Strine*, 58 Neb. 133, 78 N. W. 377; *Id.*, 59 Neb. 27, 80 N. W. 45; *Sokoloski v. New South Building & L. Ass'n*, 77 Miss. 155, 28 South. 361; *Rio Grande & W. Ry. v. Telluride Power T. Co.*, 28 Utah, 22, 63 Pac. 995; *State v. Cook*, 171 Mo. 848, 71 S. W. 829. The statute of New Jersey, declaring that the annual franchise or license fee imposed on corporations chartered by that state should be a preferred debt in case of insolvency, can have no extraterritorial effect, and such claim is not entitled to preference in insolvency proceedings against such corporations in another state. *J. A. Holsbouser Co. v. Gold Hill C. Co.*, 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183.

⁸⁹ *Runyan v. Coster's Lessee*, 14 Pet. (U. S.) 122, 10 L. Ed. 382; *Carroll v. City of East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *White v. Howard*, 46 N. Y. 144; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189. A foreign corporation which has assumed the name of an older domestic corporation, which it could not obtain if incorporated in the state, will be enjoined from the use thereof, though it has complied with the registration laws, and thereby received a certificate to do business in the state. *American Clay Mfg. Co. v. American Clay Mfg. Co.*, 198 Pa. 189, 47 Atl. 936. And see *Philadelphia Trust, etc., Co. v. Philadelphia Trust Co. (C. C.)* 123 Fed. 534; *ante*, p. 610.

statute in the latter state, for a prohibitory clause in the charter of a corporation cleaves to it everywhere.⁹⁰ It has been held, however, that a statute of wills of one state, since it has no extraterritorial effect, cannot prevent a corporation of that state from taking by devise in another state, where there is no such prohibition.⁹¹ This decision would seem to be a sound one, but the contrary has been held in Illinois.⁹² Where the laws of a state prohibit a corporation from taking land by devise, a devise in that state to a foreign corporation is void, though by its charter, and by laws of the state of its creation, it is authorized to take by devise.⁹³

Same—Power to Acquire Real Estate.

A foreign corporation may acquire and hold land, provided the transaction is not prohibited by the law of the state where the land lies or not contrary to its public policy.⁹⁴ As we have seen, if a corporation takes a conveyance of land for a purchase not authorized, or takes more land than it is authorized to take, the conveyance is not void, and only the state can object.⁹⁵ And some cases so hold even if the charter of the corporation contains an express provision against holding land.⁹⁶ In the case of a foreign corporation, the same rule is applied, and a conveyance to it will not be void because the transaction is not authorized by its charter, and its title is not to be open to collateral attack on that ground.⁹⁷ If the power of foreign corporations to acquire land is restricted by the law of the state where the land lies, a different question is presented; but here again the rule prevails that it is for the state to object, and that the title of the corporation is not open to collateral attack.⁹⁸ Under statutes imposing upon foreign corporations

⁹⁰ White v. Howard, 38 Conn. 342, 1 Cumming, Cas. Priv. Corp. 81.

⁹¹ Id.

⁹² Starkweather v. Society, 72 Ill. 50, 22 Am. Rep. 133.

⁹³ White v. Howard, 46 N. Y. 144.

⁹⁴ Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. Ed. 547; American & F. C. Union v. Yount, 101 U. S. 352, 25 L. Ed. 888; Lakeview Land Co. v. San Antonio Traction Co., 95 Tex. 252, 66 S. W. 766; Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; ante, p. 130.

⁹⁵ Ante, p. 164.

⁹⁶ Ante, p. 166.

⁹⁷ Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104.

⁹⁸ Seymour v. Slide & S. Gold Mines, 153 U. S. 523, 14 Sup. Ct. 847, 38 L. Ed. 807; Carlow v. Aultman, 28 Neb. 672, 44 N. W. 873; Galveston Land & I. Co. v. Perkins (Tex. Civ.) 26 S. W. 256; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627; McKinley-Lanning Loan & T. Co. v. Gordon, 113 Iowa, 481, 85 N. W. 816. Cf. Myatt v. Ponca City L. & I. Co., 14 Okl. 220, 78 Pac. 185.

conditions precedent to doing business in the state, the question whether failure to comply with the conditions renders a conveyance to the corporation void must of course depend upon the terms and construction of the statute. In the absence of a clear intention on the part of the legislature to declare the transaction void, however, it would seem that the same rule should apply, and that in such case the corporations acquire good title subject only to the right of the state to attack it.**

Corporations de Facto.

A foreign corporation will be accorded the status of a corporation de facto, if it is a corporation de facto in the state by which it was created, and if it has complied with the law relating to foreign corporations. In such a case, persons who deal with it cannot attack its corporate existence on the ground of irregularity in organization. Any question affecting its right to transact business because of such irregularity is a matter of inquiry only for the state of its creation.¹⁰⁰

Rights and Immunities of Members.

The rights and immunities of members of foreign corporations are within the rule of comity, and must be respected. They cannot be held individually liable, for instance, for the debts or torts of the corporation, unless they are made so by its charter, or by some statute.¹⁰¹

Quo Warranto and Mandamus.

Quo warranto is a proper remedy, unless excluded by statute, to try the right of a foreign corporation to carry on business in the state, and to oust it if it is without right.¹⁰² The executive officers of the state, in issuing certificates to foreign corporations under the statutes, act in a ministerial capacity, and their determination is not judicial and final, but may be reviewed by the courts.¹⁰³

** *Fritz v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; *Carlow v. Aultman*, 28 Neb. 672, 44 N. W. 873; *Louisville Property Co. v. City of Nashville*, 114 Tenn. 212, 84 S. W. 810. And see *Hamilton v. Reeves*, 69 Kan. 844, 76 Pac. 418.

¹⁰⁰ *Lancaster v. Improvement Co.*, 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; *Bank of Toledo v. International Bank*, 21 N. Y. 542.

¹⁰¹ *Merrick v. Van Santvoord*, 84 N. Y. 208.

¹⁰² *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108; *State v. Fidelity & Casualty Ins. Co.*, 49 Ohio Sup. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573; *State v. Western Union Mut. Life Ins. Co.*, 47 Ohio St. 167, 24 N. E. 892, 8 L. R. A. 129; *State v. Fidelity & Casualty Ins. Co.*, 77 Iowa, 648, 42 N. W. 509; *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449; *State v. American Book Co.*, 65 Kan. 847, 69 Pac. 563. And see *MacGinniss v. Boston & M. Con. C. & S. Min. Co.*, 29 Mont. 428, 75 Pac. 89; *Attorney General v. Electric Storage B. Co.*, 188 Mass. 239, 74 N. E. 767.

¹⁰³ *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108; *State v. Fidelity & Casualty Ins. Co.*, 49 Ohio Sup. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573.

Where the executive officer of the state charged with the duty of granting and revoking permits for foreign insurance companies to do business in the state is required to grant permits when certain conditions exist, and is not vested with discretionary power, mandamus will lie to compel him to grant a permit in a proper case.¹⁰⁴ But if he is invested with discretionary power, as where he is required to grant a permit when he "is satisfied with the capital, securities, investments," etc., of the corporation applying for it, or where he is given the power to revoke or refuse a permit, where, after an examination, he "has reason to believe" that a statement made by a foreign corporation is false, his action cannot be controlled by mandamus.¹⁰⁵

ACTIONS BY AND AGAINST.

250. By the comity of states, a corporation created under the laws of one state or country may sue in the courts of another state or country unless otherwise provided by statute. }

251. A foreign corporation cannot be sued in the courts of a state, unless jurisdiction can be obtained by service within the state upon an authorized agent. Provision is very generally made by statute for service upon particular officers of foreign corporations doing business in the state, and a corporation which does business within a state having such a statute impliedly submits to its jurisdiction. }

253. A judgment recovered against a foreign corporation after due service of process on an authorized agent in the state is entitled, under the constitution and laws of the United States, to the same faith and credit in all other states as in the state in which it was rendered. }

254. For the purposes of jurisdiction of actions in the federal courts, a corporation is a "citizen" or "inhabitant" of the state of its creation, and of that state only. }

Actions by Foreign Corporations.

It is well settled that, by the law of comity among nations, a corporation created by one sovereignty may assert its rights by suit in the courts of another sovereignty. The same law of comity prevails among the states of this Union, and it is the rule that, unless otherwise provided by statute, a foreign corporation may sue.¹⁰⁶

¹⁰⁴ Kansas Home Ins. Co. v. Wilder, 43 Kan. 731, 23 Pac. 1061.

¹⁰⁵ State v. Carey, 2 N. D. 36, 49 N. W. 164; Dwelling-House Ins. Co. v. Wilder, 40 Kan. 561, 20 Pac. 265.

¹⁰⁶ Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; British American Land Co. v. Ames. 6 Metc. (Mass.) 391; Portsmouth Livery Co. v. Watson, 10 Mass. 91; Cone Export & Commission Co. v. Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55

Some—Statutes Imposing Conditions.

Under some statutes imposing on foreign corporations conditions which they must comply with before doing business in the state, contracts entered into in violation of the statute are void, and in such case, of course, no action upon the contract can be maintained even if the conditions have been afterwards complied with.¹⁰⁷ If, however, the effect of the statute is not to render the contract void, an action may be maintained on the contract unless the statute otherwise provides.¹⁰⁸

In some states by express provision of the statute a foreign corporation doing business in the state without complying with prescribed conditions cannot maintain an action in its courts on a contract growing out of such business. If the effect of the statute is to render such contracts void, no subsequent compliance can validate the contract or enable the corporation to maintain an action thereon.¹⁰⁹ Where such is not the effect of the statute, it is generally held that a subsequent compliance is sufficient to enable the corporation to maintain a suit.¹¹⁰

Ark. 168, 18 S. W. 43; *Emerson v. Machine Co.*, 51 Mich. 5, 16 N. W. 182; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1582; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Washburn Mill Co. v. Bartlett*, 8 N. D. 138, 54 N. W. 544; *National Cash-Register Co. v. Wilson*, 9 S. D. 112, 81 N. W. 285. The fact that the incorporators were residents of the state and that the object of the incorporation was to obtain the benefit of less rigorous laws could not defeat the right to sue. *Cumberland Tel. & T. Co. v. Louisville Home Tel. Co.*, 114 Ky. 892, 72 S. W. 4.

¹⁰⁷ *Delaware R. Q. & C. Co. v. Bethlehem & N. P. Ry. Co.*, 204 Pa. 22, 53 Atl. 533; ante, p. 617.

¹⁰⁸ *C. B. Rogers & C. Corp. v. Simmons*, 155 Mass. 259, 29 N. E. 580; *Washburn Mill Co. v. Bartlett*, 8 N. D. 138, 54 N. W. 544; *National Cash-Register Co. v. Wilson*, 9 S. D. 112, 81 N. W. 285; *Garratt-Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 87 Atl. 948, 38 L. R. A. 545, 78 Am. St. Rep. 852.

¹⁰⁹ *Delaware R. Q. & C. Co. v. Bethlehem & N. P. Ry. Co.*, supra.

¹¹⁰ *Simplex Dairy Co. v. Cole (C. C.)* 86 Fed. 739; *Neuchatel Asphalt Co. v. Mayor, etc.*, 155 N. Y. 373, 49 N. E. 1043; *Security Savings & L. Ass'n v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Chicago Mill & L. Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128; *State v. American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041; and see *Southerland-Innes Co. v. Chaney*, 72 Ark. 327, 80 S. W. 152; *Iowa Falls Mfg. Co. v. Farrar* (S. D.) 104 N. W. 440. Contra, *G. Hellman Brewing Co. v. Piemeisl*, 85 Minn. 121, 88 N. W. 441; *Sherman Nursery Co. v. Augenbaugh*, 98 Minn. 201, 100 N. W. 1101. Compliance after commencement of suit is enough. *Carson-Rand Co. v. Stern*, 129 Mo. 381, 81 S. W. 772, 82 L. R. A. 420; *Hamilton v. Reeves & Co.*, 69 Kan. 844,

Because the corporation has not complied, it is not prevented from recovering on a counterclaim in an action brought by another,¹¹¹ or from appealing from a judgment in such an action.¹¹² In a few states it is enacted that a foreign corporation which has not complied with the statutory conditions cannot maintain a suit even on a contract made outside the state;¹¹³ but generally the prohibition of the statutes is confined to doing business in the state, and the right to maintain an action on a contract made elsewhere is not affected.¹¹⁴

The prohibition against the maintenance of actions unless the corporation has complied with the statutory conditions is confined, expressly or by implication, to actions on contracts, and does not extend to actions for torts committed in the state, or to other actions growing out of the invasion of rights of property.¹¹⁵

Actions against Foreign Corporations.

Formerly it was held that a foreign corporation could not be sued for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves the state, so as to render service of process upon him service upon the corporation, prevented personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction.¹¹⁶ With the growth of corporations, the doctrine of the exemption of foreign corporations from suit caused

hibit or limit the right of such corporation to sue in the federal courts. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79.

¹¹¹ *J. R. Alsing Co. v. New England Quartz & S. Co.*, 66 App. Div. 473, 73 N. Y. Supp. 847.

¹¹² *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

¹¹³ See *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1103.

¹¹⁴ *White River L. Co. v. Southwestern Imp. Ass'n*, 55 Ark. 625, 18 S. W. 1055; *Ware Cattle Co. v. Anderson*, 107 Iowa, 231, 77 N. W. 1026; *Slaytor-Jennings Co. v. Specialty Paper Box Co.*, 69 N. J. Law, 214, 54 Atl. 247; *Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507. But see *Seamans v. Temple & Co.*, 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457.

¹¹⁵ *American Typefounders' Co. v. Conner*, 6 Misc. Rep. 391, 26 N. Y. Supp. 742; *Joseph Schlitz Brewing Co. v. Ester*, 86 Hun, 22, 33 N. Y. Supp. 143; *St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 60 Ark. 825, 80 S. W. 850, 28 L. R. A. 83; *Delaware & A. T. & T. Co. v. Pensauken Tp. (C. O.)* 116 Fed. 910. Cf. *St. Louis, etc., Co. v. Beilharz (Tex. Civ. App.)* 88 S. W. 512. Cf. *Bishoff v. Automobile Touring Co.*, 97 App. Div. 17, 89 N. Y. Supp. 594.

¹¹⁶ Per Mr. Justice Field, in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, 357. See *McQueen v. Manufacturing Co.*, 16 Johns. (N. Y.) 5; *Peckham v. Inhabitants*, 16 Pick. (Mass.) 274, 286.

much inconvenience and injustice, and to obviate this the legislatures of the several states interposed, and provided for service of process upon officers and agents of foreign corporations doing business therein. These statutes, which usually provide that before doing business in the state the corporation shall appoint an agent for service of process upon it, are valid, as we have seen; for a state has a right to impose conditions upon allowing a foreign corporation to do business.¹¹⁷ If a foreign corporation comes into a state in which there is such a law, and transacts business there, it impliedly submits to the jurisdiction of the state, and will be bound when served with process in the manner provided.¹¹⁸ "The state may," said Mr. Justice Field in *St. Clair v. Cox*,¹¹⁹ "impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in the state, it will

¹¹⁷ *Milwaukee Trust Co. v. Germania Ins. Co.*, 106 La. 669, 31 So. 298. Where the Tennessee statute provided for service of process on a particular person in behalf of a foreign corporation, and pursuant thereto a nonresident company appointed such person as its agent to receive process, and a later act provided that service might be made on any other agent, by thereafter continuing to do business in the state the company assented to the terms of the later act, at least to the extent of consenting to service of process on an agent so far representative in character that the law would imply authority in him to receive such service within the state. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 42 L. Ed. 569. A provision in a contract between a foreign building and loan association and a resident of the state requiring all actions against the association to be brought in the state of the company's incorporation was void, as opposed to the settled policy of the state, as indicated by an act subsequently passed, requiring foreign building and loan associations to consent that legal notice of suit against them might be served upon the auditor. *Field v. Eastern Building & L. Ass'n*, 117 Iowa, 185, 90 N. W. 717.

¹¹⁸ *Smith v. Empire State-Idaho M. & D. Co.* (C. C.) 127 Fed. 462; *J. B. Watkins Land-Mortg. Co. v. Elliott*, 62 Kan. 291, 62 Pac. 1004, 84 Am. St. Rep. 385. And see *Henrietta Mining & M. Co. v. Johnson*, 173 U. S. 221, 19 Sup. Ct. 402, 43 L. Ed. 675. If the corporation transacts business without appointing an agent, service may be had on a resident agent. *Moch v. Virginia F. & M. Ins. Co.* (C. C.) 10 Fed. 696; *Funk v. Anglo-Am. Ins. Co.*, 27 Fed. 336. If the statute requires the corporation to file a stipulation that process may be served on a designated state officer, and the corporation transacts business without filing the stipulation, service may nevertheless be made upon such officer. *Ehrman v. Teutonia Ins. Co.* (D. C.) 1 Fed. 471; *Masons' Fraternal Acc. Ass'n v. Riley*, 60 Ark. 578, 31 S. W. 148. Contra, *Rothrock v. Dwelling House Ins. Co.*, 161 Mass. 423, 37 N. E. 206, 23 L. R. A. 863, 42 Am. St. Rep. 418. "The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there." Per Mr. Justice Gray, in *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

¹¹⁹ 106 U. S. 350, 1 Sup. Ct. 354, 360, 22 L. Ed. 222.

accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process."¹²⁰

By the weight of authority, statutes to the contrary notwithstanding, service upon a person as the agent of a foreign corporation will be binding upon the corporation only when such person represents the corporation. The mere fact that the person upon whom service is made is an officer of the corporation does not render the service equivalent to service upon the corporation, so as to give the court jurisdiction over it. He must be in the state as the representative of the corporation. If a corporation should send an agent into another state to make contracts there on its behalf, service on him in an action on a contract so made, in accordance with the laws of the state, would bind the corporation.¹²¹ But if an officer of the corporation should go into the state, not as the representative of the corporation, but on business of his own, service on him would not bind the corporation, either in the state or in the federal courts.¹²² This is the well-settled rule of the

¹²⁰ And see *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; *Baltimore & O. R. Co. v. Gallahue's Adm'r*, 12 Grat. (Va.) 655, 65 Am. Dec. 254; *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. Ed. 354; *Moulin v. Insurance Co.*, 24 N. J. Law, 222, 25 N. J. Law, 57; *Wilson v. Fire-Alarm Co.*, 149 Mass. 24, 20 N. E. 318; *Day v. Bank*, 13 Vt. 97, 101; *Gibbs v. Insurance Co.*, 63 N. Y. 114, 20 Am. Rep. 513; *Emerson v. Machine Co.*, 51 Mich. 5, 16 N. W. 182; *Green v. Equitable Mut. L. Ins. & E. Ass'n*, 105 Iowa, 628, 75 N. W. 635; *State v. North American Land & T. Co.*, 106 La. 621, 31 So. 172.

¹²¹ See cases above cited. Service of process on a general officer of a foreign corporation, who voluntarily came into the state to adjust a difference between the corporation and plaintiff with reference to the subject-matter of the suit, while such agent was within the state, was sufficient to confer jurisdiction of the corporation. *Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co.* (C. C.) 136 Fed. 505.

¹²² *Newell v. Railway Co.*, 19 Mich. 336; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Moulin v. Insurance Co.*, 24 N. J. Law, 222, 224; *Good Hope Co. v. Railway Barb Fencing Co.* (C. C.) 22 Fed. 635; *Bentlif v. Finance Corp.* (C. C.) 44 Fed. 667; *State v. District Court of Ramsey Co.*, 26 Minn. 233, 2 N. W. 698; *Goldey v. Morning News Co.*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23

federal courts, and of most of the state courts, but it is not fully recognized by all of the state courts.¹²³ In New York it is provided that personal service of the summons upon a foreign corporation in an action for a cause arising in the state may be made by delivering a copy thereof, within the state, to the president, secretary, or treasurer, or a director thereof; and it has been held that it is not necessary that the officer served shall be in the state in his official capacity, or engaged in the business of the corporation, nor that the corporation shall have property, or even do business, or have a place of business, in the state.¹²⁴ It must be borne in mind, however, that it is only by coming into the state that a foreign corporation submits to the jurisdiction, and that, even if service is made in the manner required by statute, the court acquires no jurisdiction over it, unless it is doing business in the state.¹²⁵ If the corporation does transact business in the state, unless the statute otherwise provides, it is amenable to process even in an action upon a cause of action which arose outside the state, whether the action is one of contract or of tort.¹²⁶

Sup. Ct. 728, 47 L. Ed. 1113; *Carsten & Earles v. Leidigh & H. Lumber Co.*, 18 Wash. 450, 51 Pac. 1051, 39 L. R. A. 548, 63 Am. St. Rep. 906; *Mecke v. Valleytown Mineral Co.*, 93 Fed. 697, 35 C. C. A. 151; *Scott v. Stockholders' Oil Co.* (C. C.) 122 Fed. 835; *Frawley, B. & W. v. Pennsylvania Casualty Co.* (C. C.) 124 Fed. 259; *Louden Machinery Co. v. American Mal. Iron Co.* (C. C.) 127 Fed. 1009; *Puster v. Parker Mercantile Co.* (N. J. Ch.) 59 Atl. 232.

¹²³ *Hiller v. Railroad Co.*, 70 N. Y. 223; *Pope v. Manufacturing Co.*, 87 N. Y. 137; *Klopp v. Creston C. G. W. Co.*, 34 Neb. 808, 52 N. W. 819, 33 Am. St. Rep. 666; *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447; *Payne & Joubert v. East Union L. Co.*, 109 La. 706, 33 South. 739. And see *Houston v. Filler* (C. C.) 85 Fed. 757; *Weston v. Citizens' Nat. Bank* (Sup.) 71 N. Y. Supp. 827.

¹²⁴ *Hiller v. Railroad Co.*, *supra*; *Pope v. Manufacturing Co.*, *supra*.

¹²⁵ *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Goldey v. Morning News Co.*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Boardman v. S. S. McClure Co.* (C. C.) 123 Fed. 614; *Central G. & S. Exchange v. Board of Trade*, 125 Fed. 463, 60 C. C. A. 299; *Earle v. Chesapeake & O. Ry. Co.* (C. C.) 127 Fed. 235; *Martin v. New Trinidad Asphalt Co.* (C. C.) 180 Fed. 394; *Crook v. Girard Iron Co.*, 87 Md. 138, 39 Atl. 94, 67 Am. St. Rep. 325; *Greaves v. Posner*, 111 Iowa, 651, 82 N. W. 1022; *Walter A. Zelnicker Supply Co. v. Mississippi C. O. Co.*, 103 Mo. App. 94, 77 S. W. 321; *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; *Kendall v. American Automatic L. Co.*, 198 U. S. 477, 25 Sup. Ct. 768, 49 L. Ed. 1183. Service of summons within the state on the directors of a foreign insurance company residing in the state, as provided by the New York statute, when the cause of action arises therein, is a valid service if the company is doing business in the state, and confers jurisdiction on a federal court sitting in that state. *Pennsylvania Lumbermen's Mut. F. Ins. Co., v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 862.

¹²⁶ *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Smith v. Empire State-Idaho M. & D. Co.* (C. C.) 127 Fed. 462; *Insurance*

If a foreign corporation has property so situated within the limits of a state, and under its jurisdiction, that it may be attached by the ordinary process of law, a suit may be there maintained against the corporation by an attachment of the property, as it might against a foreign individual having property so situated, though a personal judgment could not be rendered against the corporation.¹²⁷ And, in general, if a foreign corporation has property within the limits of a state, the courts have jurisdiction to the extent of controlling its disposition.¹²⁸

Same—Ceasing to do Business in the State.

Where the statute provides for service of process upon officers and agents of foreign corporations doing business in the state, as we have seen, a foreign corporation, by transacting business in the state, impliedly consents to be sued and submits to the jurisdiction. Accordingly, if it ceases to do business in the state, and has designated no agent on whom services can be made, it can no longer be sued.¹²⁹ Some statutes provide that the corporation shall name some person on whom service of process can be made, and under such a statute the death or removal of the agent from the state, or the revocation of his authority, leaves the corporation without any agent on whom process can be served.¹³⁰ To remedy his defect many statutes provide that service shall be made upon a permanent official of the state, so that death, removal, or change of officer shall not put the corporation beyond the reach of the process of the courts; and under such statutes a withdrawal of the authority is not operative to deprive the courts of jurisdiction of actions which have arisen out of transactions entered into by the company while doing business in the state.¹³¹

Co. v. McLimons, 28 Neb. 653, 44 N. W. 991; *Humphreys v. Newport News M. V. Co.*, 33 W. Va. 135, 10 S. E. 39. Contra, *Olson v. Hump Min. Co.* (C. C.) 130 Fed. 1017 (Washington statute).

¹²⁷ *Blackstone Mfg. Co. v. Inhabitants of Blackstone*, 13 Gray (Mass.) 488; *Hodgson v. Southern Building & L. Ass'n*, 91 Md. 439, 46 Atl. 971; *Chitty v. Pennsylvania Ry. Co.*, 62 S. C. 526, 40 S. E. 944. See, also, *Strom v. Montana Central Ry. Co.*, 81 Minn. 346, 84 N. W. 46.

¹²⁸ *Peoples' Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20; *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574.

¹²⁹ *Conley v. Mathleson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Geer v. Mathleson Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; *Cady v. Associated Colonies* (C. C.) 119 Fed. 421. But see *McCord Lumber Co. v. Doyle*, 97 Fed. 22, 38 C. C. A. 34.

¹³⁰ *Forrest v. Pittsburg Bridge Co.*, 116 Fed. 357, 53 C. C. A. 577.

¹³¹ *Mutual Reserve F. L. Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Collier v. Mutual Reserve F. L. Ass'n* (C. C.) 119 Fed. 617; *Davis v. Kansas & T. C. Co.* (C. C.) 129 Fed. 149; *Home Benefit Soc. v. Muehl*, 109 Ky. 479, 59 S. W. 520; *Magoffin v. Mutual Reserve F. L. Ass'n*, 87 Minn.

Same—Who May Sue.

As a rule a foreign corporation may be sued by a nonresident as well as by a citizen.¹⁸² In some states, however, it is enacted that a foreign corporation may be sued by a nonresident or by another foreign corporation only upon a cause of action which did not arise within the state.¹⁸³ Such a provision, in discriminating between resident and non-resident plaintiffs, is not repugnant to the provisions of the federal constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;¹⁸⁴ nor is it unconstitutional, as denying full faith and credit to the judgment of another state, in so far as it precludes the maintenance of an action on such judgment by a foreign corporation.¹⁸⁵

Effect of Judgment against Foreign Corporation.

A judgment recovered against a foreign corporation after due service of process on an authorized agent in the state is entitled, under

280, 91 N. W. 1115, 94 Am. St. Rep. 699; *Groel v. United Electric Co.* (N. J. Ch.) 60 Atl. 822; *Woodward v. Mutual Reserve L. Ins. Co.*, 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519; *Johnson v. Mutual Reserve L. Ins. Co.*, 45 Misc. Rep. 316, 90 N. Y. Supp. 539, affirmed 93 N. Y. Supp. 1048, 1052, 1062; *Fisher v. Traders' Mut. L. Ins. Co.*, 136 N. C. 217, 48 S. E. 667. Contra, *Swann v. Mutual Reserve L. Ass'n (C. C.)* 100 Fed. 922; *Friedman v. Empire Life Ass'n (C. C.)* 101 Fed. 535. Where a foreign insurance company appointed agents in a state, and did business therein, it is conclusively presumed to have assented to a statute providing that, when such company ceased to do business in such state, the agent last designated by it to receive service shall be deemed to continue as its attorney for such purpose. *Green v. Equitable Mut. L. & E. Ass'n*, 105 Iowa, 628, 75 N. W. 635.

¹⁸² *Johnson v. Insurance Co.*, 132 Mass. 432; *Youmans v. Minnesota Title Ins. & T. Co. (C. C.)* 67 Fed. 282. A foreign corporation may be sued, for a personal tort committed abroad, in a federal court in New York, by serving process upon the agents conducting its business there, though, by the state statutes, service upon such agents would not be sufficient to bring the corporation within the jurisdiction of the state courts. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. See, also, *Western Union Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395, 77 S. W. 433; *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513.

¹⁸³ See *Robinson v. Oceanic Steam N. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; *Strawn v. Edward J. Brandt-Dent Co.*, 71 App. Div. 234, 75 N. Y. Supp. 698, affirmed 175 N. Y. 463, 67 N. E. 1090; *Coolidge v. American Realty Co.*, 91 App. Div. 14, 86 N. Y. Supp. 318; *Emerson T. & Co. v. McCormick*, 51 Mich. 5, 16 N. W. 182; *Georgia Central R. R. & B. Co. v. Georgia Construction & I. Co.*, 32 S. C. 319, 11 S. E. 192; *Bryan v. Western Union T. Co.*, 133 N. C. 603, 45 S. E. 938.

¹⁸⁴ *Robinson v. Oceanic Steam Hav. Co.*, supra; *Georgia Central R. R. & B. Co. v. Georgia Construction & I. Co.*, supra.

¹⁸⁵ *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225.

the constitution and laws of the United States, to the same faith and credit in all other states as in the state in which it was rendered.¹⁸⁶ A judgment against a corporation in one state can always be attacked in another state by showing that the court acquired no jurisdiction to render a personal judgment against it. And, to sustain a personal judgment against a foreign corporation, there must have been personal service upon an authorized agent within the state, or a voluntary appearance by the corporation.¹⁸⁷ In *St. Clair v. Cox*,¹⁸⁸ it was held: (1) That, when service is made within a state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the state court to render a personal judgment which will be recognized by the federal courts as binding upon the corporation, that it shall appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or finding of the court—that the corporation was engaged in business in the state. (2) That if the transaction of business by the corporation in the state, general or special, appears, a certificate of service by the proper officer on a person who was its agent there is *prima facie* evidence that the agent represented the company in the business, but it may be shown, when the record is offered as evidence in another jurisdiction, that the agent did not represent the corporation; that his duties were limited to those of a subordinate employé, or to a particular transaction; or that his agency had ceased when the matter in suit arose. (3) That where there is nothing in the record offered in evidence to show that the corporation was engaged in business in the state where service was made on its agent, and the return of the officer gives no information on the subject, so that it does not appear,

¹⁸⁶ *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451.

¹⁸⁷ *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 22 L. Ed. 222. If the corporation appears generally, the court acquires jurisdiction. *Moffitt v. Chicago Chronicle Co.*, 107 Iowa, 407, 78 N. W. 45; *Wineburgh v. United States Steam & S. R. A. Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; *Newcomb v. New York Central & H. R. R. Co.*, 182 Mo. 687, 81 S. W. 1069. The filing of a petition and bond for the removal of a cause from a state to a federal court, and the proceedings thereon, do not constitute such a general appearance as will prevent the federal court from setting aside the service as illegal and void. *Farmer v. National Life Ass'n.* (C. C.) 50 Fed. 829; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

¹⁸⁸ 106 U. S. 350, 1 Sup. Ct. 354, 22 L. Ed. 222. See, also, *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Central Grain & S. Exch. v. Board of Trade*, 125 Fed. 463, 60 C. C. A. 299; *Earle v. Chesapeake R. Co.* (C. C.) 127 Fed. 235; *Jackson v. Delaware River A. Co.* (C. C.) 131 Fed. 184; *Eureka Mercantile Co. v. California Ins. Co.*, 130 Cal. 153, 62 Pac. 393; *J. B. Watkins Land-Mtg. Co. v. Elliott*, 62 Kan. 291, 62 Pac. 1004.

even *prima facie*, that the alleged agent stood in any such representative character to the company as could justify service upon him, the record is properly excluded.

Jurisdiction of Federal Courts in Actions against Foreign Corporations.

Since the laws of a state creating corporations have no extraterritorial effect, a corporation cannot be a citizen or an inhabitant of any state other than that in which it was incorporated. It is well settled, therefore, that, for the purpose of jurisdiction of actions by and against corporations in the federal courts, a corporation is a "citizen" or "inhabitant" of that state only.¹³⁹ This principle has frequently been applied, though not always uniformly, in determining the jurisdiction of the federal courts of suits against corporations. Formerly the judiciary act required suits, with certain exceptions, to be brought in the district whereof the defendant might be an inhabitant, or in which he might be "found." Under this provision it was held that a corporation could be sued in a state other than that of its creation, if it carried on business there, and had an agent there, in compliance with a state statute, upon whom process could be served. Under such circumstances it was "found" there, though not an inhabitant.¹⁴⁰ In 1887 the judiciary act was changed by omitting the last clause. And the present act provides that a civil suit before a circuit or district court must be brought in the district of which the defendant is an inhabitant, except when the jurisdiction is founded only on the fact that the action is between citizens of different states, in which case suit may be brought in the district of the residence of either the plaintiff or the defendant. Under this statute a suit in the federal courts against a corporation, where the ground of federal jurisdiction is the diverse citizenship of the parties, may be brought either in the district of which the corporation is an inhabitant, or in the district wherein the plaintiff resides. In all other cases the suit must be brought in the district of which the corporation is an inhabitant; and a corporation is not a citizen, inhabitant, or resident of any state, within the meaning of this provision, other than that by which it was created, though it may do business and have an agent in other states, and may have submitted in other states to the jurisdiction of the state courts.¹⁴¹

¹³⁹ Ante, p. 66, and cases there cited.

¹⁴⁰ *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 858; *Knott v. Insurance Co.*, Fed. Cas. No. 7,894; *Fonda v. Assurance Co.*, Id. 4,904.

¹⁴¹ *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed.

This provision, in terms, applies only to so much of the jurisdiction of the circuit courts of the United States as is "concurrent with the courts of the several states," and as concerns cases in which the matter in dispute exceeds \$2,000 in value. It applies to trade-mark cases, for here there is concurrent jurisdiction.¹⁴² In patent and copyright cases, however, in which exclusive jurisdiction is given to the federal courts, and without regard to the amount in controversy, it has been held that the provision does not apply, and that in such cases a corporation may be sued in any district in which service can be had upon it.¹⁴³ The statute does not apply to suits against aliens or corporations created by a foreign government, for they are not inhabitants of any state, and they may be sued in any district where they may be served with process.¹⁴⁴

VISITORIAL POWER OVER FOREIGN CORPORATIONS.

255. The courts of a state have no visitorial power over foreign corporations, nor jurisdiction to regulate their internal affairs.

This, as a general proposition, is well settled. Such power and jurisdiction belong solely to the courts of the state in which the corporation was created. And no such jurisdiction is conferred upon the courts of a state by a statute subjecting foreign corporations doing business in the state to actions in its courts. Thus, the courts of a state cannot enforce a forfeiture of the charter of a foreign corporation for violation of law, or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the by-laws, or the relations between the corporation and its members, arising out of,

942; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 985, 36 L. Ed. 768, 2 Cumming, Cas. Priv. Corp. 5, *Shep. Cas. Corp.* 55, W. D. Smith, Cas. Corp. 15; *Filli v. Railroad Co.* (C. C.) 87 Fed. 65. Contra, *Miller v. Mining Co.* (C. C.) 45 Fed. 345; *U. S. v. Southern Pac. R. Co.* (C. C.) 49 Fed. 297; *Shainwald v. Davids* (D. C.) 69 Fed. 704.

¹⁴² *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402.

¹⁴³ This point seems not to have been finally decided by the supreme court, but there is dictum in support of the text, and the lower courts have so held, regarding the decisions of the supreme court, as being to this effect. See *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Smith v. Manufacturing Co.* (C. C.) 67 Fed. 801; *National Button Works v. Wade* (C. C.) 72 Fed. 298. Contra, *Donnelly v. Cordage Co.* (C. C.) 66 Fed. 618; *Gorham Manuf'g Co. v. Watson* (C. C.) 74 Fed. 418; *Union Switch & Signal Co. v. Hall Signal Co.* (C. C.) 65 Fed. 625.

¹⁴⁴ *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211.

and depending upon, the law of its creation.¹⁴⁵ Therefore, it has been held that they cannot entertain an application of a stockholder of a foreign corporation, even though he be a resident of the state, for a writ of mandamus to compel the corporation to annul a forfeiture of his stock, and reinstate him as a stockholder;¹⁴⁶ nor a suit to enjoin a foreign corporation from paying a stock dividend, upon the ground that it has no authority to declare such a dividend;¹⁴⁷ nor a suit to appoint a receiver generally, and not merely of the assets within the state;¹⁴⁸ nor a suit by a stockholder to compel a distribution of assets;¹⁴⁹ nor a suit by a former member of a foreign mutual insurance company to compel it to restore him to his rights under a policy issued to him in the state where the corporation was created.¹⁵⁰

But it has been held that this doctrine does not prevent the courts of a state from issuing a writ of mandamus, upon application of a stockholder, to compel the resident president of a foreign corporation doing business in the state to allow an inspection of books of the corporation in his possession;¹⁵¹ nor from entertaining an action by a stockholder to compel a foreign corporation doing business in the state to issue to him a new or duplicate stock certificate in place of one which has been lost or destroyed.¹⁵² And when a receiver has been appointed by the court where the corporation is domiciled, the court of another juris-

¹⁴⁵ *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Wilkins v. Thorne*, 60 Md. 253; *Condon v. Mutual Reserve F. L. Ass'n*, 89 Md. 99, 42 Atl. 948, 44 L. R. A. 149, 78 Am. St. Rep. 169; *Stockley v. Thomas*, 89 Md. 863, 43 Atl. 766; *State v. North American Land & T. Co.*, 106 La. 621, 31 South. 172, 87 Am. St. Rep. 309; *Madden v. Pennsylvania Electric L. Co.*, 199 Pa. 454, 49 Atl. 296. But see *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; *Richardson v. Clinton Wall T. Mtg. Co.*, 181 Mass. 580, 64 N. E. 400; *Miller v. Quiney*, 179 N. Y. 294, 72 N. E. 116.

¹⁴⁶ *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039. But see *Gullford v. Telegraph Co.*, 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407.

¹⁴⁷ *Howell v. Railway Co.*, 51 Barb. (N. Y.) 378. See, also, *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621.

¹⁴⁸ *Stafford v. Mills Co.*, 13 R. I. 310. See, also, *Leary v. Columbia River & P. S. Nav. Co.* (C. C.) 82 Fed. 775; *Sidway v. Missouri Land & Live-Stock Co.* (C. C.) 101 Fed. 481.

¹⁴⁹ *Redmond v. Manufacturing Co.*, 13 Abb. Prac. N. S. (N. Y.) 332.

¹⁵⁰ *Smith v. Insurance Co.*, 14 Allen (Mass.) 336.

¹⁵¹ *Richardson v. Swift*, 7 Houst. (Del.) 137, 30 Atl. 781. And see *State v. McCullough*, 3 Nev. 202; *Tyng v. Corporation Trust Co.*, 104 App. Div. 486, 98 N. Y. Supp. 928; *Fay v. Coughlin-Sandford Switch Co.*, 47 Misc. Rep. 687, 94 N. Y. Supp. 628. But see *People v. Parker Vein Coal Co.*, 10 How. Prac. (N. Y.) 543.

¹⁵² *Gullford v. Telegraph Co.*, 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407.

diction has power to appoint an ancillary receiver for the assets within its jurisdiction,¹⁵³ although such appointment is discretionary.¹⁵⁴

The dissolution of a corporation, whether by the expiration of its charter, the forfeiture of its privileges, or as the result of its insolvency, is governed and controlled by its charter and the law of the sovereignty by which it was created;¹⁵⁵ and such dissolution is effective everywhere.¹⁵⁶ A court of one state or country, therefore, has no jurisdiction of a suit to dissolve a corporation created by the laws of another state or country.¹⁵⁷ Local courts of equity, however, will take jurisdiction of the assets of a foreign corporation which may be within the state, in case of the dissolution or insolvency of the corporation, and see to their equitable distribution.¹⁵⁸

¹⁵³ *Buswell v. Order of Iron Hall*, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; *Shinney v. North American Savings, Loan & Building Co. (C. C.)* 97 Fed. 9; *Hallenborg v. Greene*, 66 App. Div. 590, 73 N. Y. Supp. 403.

¹⁵⁴ *Borton v. Brines-Chase Co.*, 175 Pa. 209, 34 Atl. 597; *Irwin v. Granite State Provident Ass'n*, 56 N. J. Eq. 244, 38 Atl. 680; *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805.

¹⁵⁵ A statute providing that corporations whose existence is terminated shall be continued for a certain period for the purpose of prosecuting and defending suits does not apply to foreign corporations. *Marion Phosphate Co. v. Perry*, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252; *Rodgers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34, 42 N. E. 515; *Fitts v. National Life Ass'n*, 130 Ala. 413, 30 South. 374; *Olds v. City Trust, Safe Deposit & Surety Co.*, 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356.

¹⁵⁶ *Marion Phosphate Co. v. Perry*, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252; *In re Stewart*, 39 Misc. Rep. 275, 79 N. Y. Supp. 525; *Fitts v. National Life Ass'n*, 130 Ala. 413, 30 South. 374. And see *E. F. Kirwan Mfg. Co. v. Truxton*, 2 Pennewill (Del.) 48, 44 Atl. 427. Where it is alleged that a foreign corporation has been dissolved by decree, the jurisdiction of the court of the home state to dissolve it must be shown, and may be inquired into. *Olds v. City Trust, Safe Deposit & Surety Co.*, 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; *Hammond v. National Life Ass'n*, 31 Misc. Rep. 182, 65 N. Y. Supp. 407.

¹⁵⁷ Note by Wm. L. Murfree, 7 C. C. A. 421; *Republican Mountain Silver Mines v. Brown*, 7 C. C. A. 412, 58 Fed. 644, 24 L. R. A. 776.

¹⁵⁸ Note, 7 C. C. A. 421; *Smith v. Insurance Co.*, 3 Tenn. Ch. 502, 6 Lea (Tenn.) 564; *Leipold v. Marony*, 7 Lea (Tenn.) 128; *Patterson v. Lynde*, 112 Ill. 196; *Barclay v. Talman*, 4 Edw. Ch. (N. Y.) 123; *Day v. Telegraph Co.*, 66 Md. 354, 7 Atl. 608; *Bank Com'rs v. Granite State Provident Ass'n*, 70 N. H. 557, 49 Atl. 124, 85 Am. St. Rep. 646; *Hallenborg v. Greene*, 66 App. Div. 590, 73 N. Y. Supp. 403; *Olds v. City Trust, Safe Deposit & Surety Co.*, 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356.

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